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In The

# Supreme Court of The United States

October Term, 1999

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RAYMOND MACARO,

*Petitioner,*

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

*Petition for a Writ of Certiorari to the State of New York Appellate Division - Second Judicial Department*

## PETITION FOR A WRIT OF CERTIORARI

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*November 29, 1999*

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## QUESTIONS PRESENTED

1. SHOULD THE PETITION BE GRANTED BECAUSE THE OPINIONS OF THE STATE COURTS CONFLICT WITH DECISIONS OF THIS COURT, HOLDING THAT EVIDENCE SEIZED PURSUANT TO A PRETEXT ARREST MUST BE SUPPRESSED AND THAT PROBABLE CAUSE ALONE WILL NOT JUSTIFY A WARRANTLESS AND NON-CONSENSUAL ENTRY INTO A SUSPECT'S RESIDENCE TO EFFECT AN ARREST, AND ARE OTHERWISE REPUGNANT TO THE FOURTH AMENDMENT'S SAFEGUARDS AND LIMITATIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES?

2. DID THE HEARING COURT ERR IN FINDING APPELLANT FIT TO STAND TRIAL?

3. WAS THE COURT'S REFUSAL TO POLL THE JURY CONCERNING MID-TRIAL PUBLICITY (WHICH CITED PROSECUTION SOURCES, REFERRED TO SUPPRESSED CONFESSIONS, INADMISSIBLE UNCHARGED CRIMES, AND STATEMENTS BY GOVERNMENT OFFICIALS AND EXPERT WITNESSES WHO NEVER TESTIFIED AT TRIAL) A DENIAL OF APPELLANT'S RIGHT TO A FAIR TRIAL AND DOES IT WARRANT THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO ORDER A NEW TRIAL?

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Petitioner, Raymond Macaro, respectfully requests that a writ of Certiorari be issued to review the order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department ("Second Department"), herein dated March 16, 1999.

## OPINIONS AND ORDERS BELOW

Certificate Denying Leave to Appeal to the New York State Court of Appeals, entered on August 31, 1999, is unpublished.

The opinion and order of the Second Department is reported at *People of the State of New York v. Raymond Macaro*, 687 N.Y.S.2d 279, Slip Op. 03766 (N.Y.A.D. 2d Dept., Apr. 26, 1999). (App. 2a).

The decision and order of the trial court, *People of the State of New York v. Raymond Macaro*, Ind. No. 88-1658 (N.Y. Sup. Ct., West. Co., October 25, 1995)(Leavitt, J.)(Decision and order granting, in part, defendant's motion to exclude evidence.) is unpublished. (App. 15a).

The decision and order of the pretrial hearing court, *People of the State of New York v. Raymond Macaro*, Ind. No. 88-1658 (N.Y. Sup. Ct., West. Co., January 23, 1995)(Cowhey, J.)(Decision/order finding defendant competent to stand trial.) is unpublished. (App. 4a).

## STATEMENT OF JURISDICTION

The Decision and Order of the Appellate Division of the Supreme Court of the State of New York, affirming petitioner's conviction, was entered on March 16, 1999. (App.2a).

Petitioner's timely application for Leave to Appeal to the New York Court of Appeals was denied on August 31, 1999. (App. 1a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, section 1, to the United States Constitution provides in relevant part "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourth Amendment to the United States Constitution provides "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the United States Constitution provides in relevant part "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

## STATEMENT OF THE CASE

On September 17, 1988, Eastchester, New York, police officers were summoned to the home of Raymond J. Macaro.[hereinafter "petitioner"] to investigate a fire. Three bodies were discovered therein: petitioner's father, Raphael Macaro Sr.; petitioner's maternal aunt, Sylvia Bennett; and petitioner's paternal aunt, Regina Deine. Raphael and Ms. Deine were found in the basement of the home. Raphael Macaro had been beaten to death, and Ms. Deine had been beaten and shot twice in the back of the head by a .38 caliber gun. Sylvia Bennett was also found dead in her bed on

the first floor. The police began an investigation and petitioner, a former probation officer of 16 years, immediately became the focus of the investigation. For a period of approximately seven weeks, petitioner's whereabouts were unknown.

On November 7, 1988, Det. Speidel, of the Eastchester Police Department, and Investigator Bocskay, of the Westchester County District Attorney's office, flew from New York to Loves Park, Illinois, to follow up a lead that petitioner was attempting to raise money by shipping his lawfully owned hand guns, in the possession of a licensed New York gun dealer, to a licensed gun dealer in Loves Park, Illinois for the purposes of sale. Det. Speidel's testimony concerning the purpose and motives of this trip was both contradictory and evasive. Initially, Det. Speidel claimed that he merely wanted to inform petitioner of the deaths in his family. (App. 78a). However, his actions, and the actions of other law enforcement personnel, were directed solely at apprehending petitioner and questioning him about the New York homicides.

Upon arrival in Illinois, Det. Speidel and Investigator Bocskay, together with Lt. Johnson of the Loves Park Police Department, went to the Madison Gun Shop to question the owner, Charles Madison, concerning petitioner's whereabouts. (App. 79a). Det. Speidel advised Mr. Madison that petitioner had "shot his family, beaten his family and burned his family" (App. 93a), and they were there to take him back to New York. (App. 90a). They further advised Mr. Madison that "one way or the other they were going to arrest [petitioner]." (App. 94a-95a). Mr. Madison advised the officers that petitioner had left several guns on consignment and was expected to return to the shop within a few days. (App. 93a). The officers immediately commenced a stake out of the gun shop and awaited petitioner's return. During this time, Det. Speidel canvassed local motels in an effort to locate petitioner.

On November 10, 1988, Det. Speidel located a car parked outside the Ranch Motel in Belvedere, Illinois, which matched the description of petitioner's car. (App. 85a). Upon investigation, the clerk at the motel positively identified petitioner from a picture as the occupant of room 14. (App. 85a). Instead of taking any immediate steps to apprehend petitioner, Det. Speidel returned to Loves Park, Illinois and sought the guidance of Assistant District Attorney Kevin Kennedy, of the Westchester County District Attorney's Office, on how to proceed. In a series of consultations between the New York detectives, A.D.A. Kennedy and Illinois States Attorney, Koski, it was decided that petitioner would not be arrested for the New York crimes. Instead, petitioner would be arrested for allegedly impersonating a peace officer in Illinois.

On November 11, 1988, Lt. Johnson drove to the Winnebago County Courthouse to obtain a B-misdemeanor arrest warrant. (App. 47a). The courthouse was closed for the Veteran's Day holiday. (App. 46a-47a). Nevertheless, the courthouse was opened, and Judge Riggs interrupted his holiday, solely for the purpose of hearing the application for the misdemeanor warrant.[1] The affidavit in support of the Illinois arrest warrant, sworn to by New York Det. Speidel, alleged that petitioner employed his probation officer's badge to purchase a can of mace and a slim jim[2] at the Madison Gun Shop in Loves Park, Illinois. At the suppression hearing, all of the statements in the warrant affidavit were directly contradicted by the sworn to in court testimony of Charles Madison, owner of the Madison Gun Shop.

Charles Madison testified that he was contacted by Lt. Johnson by phone on November 7, 1988 and was advised that

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[1]The B-misdemeanor warrant fixed bail at $ 25,000. (App. 77a).

[2] A slim jim is a thin metal tool used to open locked cars.

the police wanted to speak with him at his store. (App. 89a). The store had been closed because his wife was having a baby and he had spent the day taking her for tests. (App. 88a). Mr. Madison went to the store and opened it specifically for the purpose of meeting with the officers. (App. 90a). He met with them alone. (App. 90a). Mr. Madison was advised by the New York officers that they were looking for petitioner in connection with New York homicides and that they were going to arrest him "one way or the other." (App. 94a-95a). Contrary to the sworn statements contained in Det. Speidel's warrant affidavit, Mr. Madison testified that petitioner never showed him a badge, nor had he claimed to be a probation officer. (App. 92a). He further testified that he never told the New York detectives, or the Illinois police, that petitioner had used a badge to purchase mace and a slim jim. In fact, the subject never came up. (App. 92a). He further testified that any adult could legally buy such items in Illinois, that identification was not required, and that his store did not have a policy of asking for any identification if the individual making the purchase was an adult. (App. 97a-98a).

Armed with the pretext misdemeanor arrest warrant, the officers drove to Rockford, Illinois, where an ad hoc multi-jurisdictional task force was being assembled for the purpose of executing the B-misdemeanor warrant. This task force consisted of officers from New York, the Loves Park, Illinois, Police Department, Boone County Sheriff's Department and the Belvidere Police Department. (App. 49a). Shortly thereafter, approximately a dozen officers converged on, and surrounded, the Ranch Motel. (App. 48a). Upon arrival, all of the motel guests were evacuated from the motel and the street blocked off. (App. 48a, 63a-64a). The media was alerted and present for the B misdemeanor arrest. (App. 64a). After the motel was secured and evacuated, Deputy Sheriff Tim Brown, using a bullhorn, announced "Mr. Macaro, this is the Boone County Sheriff's Office, we have

a warrant for your arrest. Please exit your room free of any arms. . . ." (App. 49a, 66a). Deputy Brown repeated his demands for approximately 15 minutes with no response from petitioner. (App. 67a) At this point, shot guns were used to fire ferret rounds (tear gas) into petitioner's motel room. (App. 68a). Again, there was no response. At approximately 1:30 pm, an hour after arriving at the motel, the police came to the conclusion that possibly no one was in the room. (App. 49a). At this point, Deputy Brown directed the officers to enter and search the room. (App. 50a, 68a-69a). A pass key was obtained and the officers moved into position to open the door. (App. 69a). When the door was opened with the key, the officer discovered that the door was chained. Id. They proceeded to kick the door in and entered the room. Id. They discovered petitioner had fled the living area and was now inside the bathroom. (App. 69a, 71a). They withdrew from the room and fired two or three more rounds of tear gas into the room, as well as two tear gas grenades. (App. 69a).

Eventually, the police established contact with petitioner, who was threatening suicide. (App. 53a-54a). The police obtained a tape recorder, and placed it near the doorway of petitioner's room and began interrogating him about the New York homicides. (App. 54a-56a, 70a-71a). Not once during the entire interrogation was petitioner asked about the Illinois charge on which he was being arrested. (App. 70a). The police were only concerned about gathering evidence relative to the New York homicides. Throughout the entire standoff, the police were in contact with A.D.A. Kevin Kennedy of the Westchester County District Attorney's Office. (Tr. 8/16/95, p.346). A.D.A. Kennedy testified that after petitioner made incriminating statements there was now probable cause to arrest petitioner for the New York crimes.

(Tr. 10/17/95, p. 37).[3] During the interrogation, the police on the scene contacted Illinois States Attorney Roger Russell and sought a retroactive eavesdrop warrant to record their interrogation of petitioner. (App. 56a). During the course of the interrogation, Chief Burkhart asked petitioner to throw out any weapons and bullets which he did not need to kill himself. Petitioner cooperated and handed out 9mm pistol as well as extra rounds. Petitioner also handed out some letters written in anticipation of suicide. As petitioner handed out the letters, Chief Burkhart reached in and physically pulled petitioner out of his room and placed him under arrest.

Petitioner was taken from the motel to the Boone County Sheriff's Office and booked on the charges of impersonating an officer and being a fugitive from justice at 3:10 pm. (App. 22a, 73a), although, no complaint had been filed or warrant issued in New York until after 5:30 pm. (App. 24a). Petitioner was not afforded a phone call to obtain counsel. (App. 23a). Petitioner was immediately interrogated by the New York detectives about the New York homicides. When Illinois officials sought to question petitioner concerning some unsolved armed robberies, they were advised that they had to seek consent from the New York detectives. Questioning of petitioner continued until about 11 pm. The next morning, the police were advised that petitioner was represented by counsel, Gerard Damiani, Esq. (App. 25a). Despite knowledge of the legal representation, Illinois law enforcement officials continued to interrogate petitioner. Id. Although he was interrogated for two days, petitioner was never questioned about the B-misdemeanor, nor

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[3] This citation refers to the transcript of A.D.A. Kennedy's suppression hearing testimony on October 17, 1999. The transcript is missing from the file at the Westchester County clerk's office as returned from the New York Court of Appeals and thus is not included in petitioner's appendix. A copy of the relevant testimony will be forwarded as soon as the transcript is located.

was he ever prosecuted on that charge.

Petitioner was subsequently indicted in Westchester County on six counts of second degree murder and various lesser charges.

**Events subsequent to petitioner's arrest (Competency).**

Subsequent to his arrest, petitioner was found incompetent to stand trial in Illinois and confined to psychiatric hospitals in Illinois for approximately four years. (App. 4a). In 1992, petitioner was extradited to New York and arraigned on the New York offenses. Id. A plea of not guilty was entered for him and defense counsel requested that a C.P.L. § 730 hearing (competency) be held. The court appointed two psychiatrists to examine petitioner, Harvey Lothringer, M.D. and Edward Herman, M.D. (App. 4a). On January 8, 1993, both psychiatrists rendered their reports and findings. Both concluded that petitioner lacked the capacity "to assist in his own defense." (App. 4a). On February 1, 1993, without opposition, the court ordered petitioner to be committed to the Mid-Hudson Psychiatric Center. (App. 4a). On February 4, 1994, the Mid-Hudson Psychiatric Center certified petitioner competent to stand trial (App. 5a). Defense counsel requested a C.P.L. § 730 hearing and the court ordered that petitioner be examined by Dr. Lothringer and Dr. Herman. (App. 5a). Both doctors examined petitioner again and, on March 29, 1994, rendered new reports, again finding petitioner incompetent to stand trial. Id. The prosecution did not object to the findings.

On June 27, 1994, after two months without treatment, the Mid-Hudson Psychiatric Center again certified petitioner competent to stand trial. Once again, defense counsel requested a C.P.L. § 730 hearing to determine petitioner's fitness to stand trial. Petitioner was examined again by both Dr. Lothringer and Dr. Herman. Both psychiatrists rendered reports on August 18, 1994 finding petitioner incompetent to

stand trial. This time the prosecution sought, and the court ordered, a competency hearing.

At the hearing, the People called as their only witness, Dr. Manouchehr Lavian. Dr. Lavian was trained as an internist in Iran and immigrated to the United States in 1980. (App. 100a). In 1985, he joined the staff at Mid-Hudson Psychiatric Center as a "psychiatrist one," the lowest psychiatric position on the staff. (App. 103a). He took the psychiatric boards three times and failed three times. (App. 103a). He was not board certified as a psychiatrist. (App. 104a). He did not have a degree in psychiatry. (App. 105a). He further testified that he was unable to establish a relationship with petitioner. (App. 108a). In fact, he never spoke with petitioner. (App.107a). He did not conduct any psychiatric testing. Id. He could not recall what psychiatric testing had been performed on petitioner. (App. 109a-110a). He testified that no psychological testing had been performed on petitioner. (App. 110a). Although he testified that petitioner was uncooperative and may be malingering, he also testified that such uncooperative behavior was indicative of mental illness. Dr. Lavian further testified that his conclusion that petitioner was able to cooperate with counsel was based, not on personal observation, but an observation by an attendant who allegedly saw petitioner consulting rationally with his attorney. The attendant's observation was proven to be factually untrue at the hearing through witnesses with personal knowledge. Finally, Dr. Lavian testified that he did not diagnose petitioner as malingering. (App. 111a).

The defense called Dr. Herman and Dr. Lothringer to testify. Both Dr. Herman and Dr. Lothringer were board certified psychiatrists. Dr. Herman was the Director of Correctional Health Services and Forensic Psychiatry. (App. 112a). Both Dr. Herman and Dr. Lothringer were Westchester County employees who had been appointed by the court to examine petitioner. Both Dr. Lothringer and Dr. Herman actually examined petitioner and reached the conclusion that

petitioner was not fit to stand trial.

Dr. Herman testified that petitioner had an extensive psychiatric history with multiple hospitalizations. (App.6a) Petitioner's speech was clear and coherent but tangential. Id. Although, petitioner did not have hallucinations, he did suffer from persecutory delusions. (App. 7a). Dr. Herman diagnosed petitioner as suffering from schizophrenia, paranoid type. Id. Dr. Herman ultimately concluded that petitioner was "unable to assist in his defense because of his extensive delusional system and thought disorder." (App. 7a).

Dr. Lothringer testified that petitioner was extremely tangential. (App. 8a). He further testified that it was uncertain that petitioner would be able to cooperate with counsel and that petitioner was unable to trust his attorney. (App. 8a). Dr. Lothringer diagnosed petitioner as suffering from schizophrenia, paranoid type. Id.

In addition to the testimony of the psychiatrists, the prosecution offered into evidence all of the psychiatric records from Mid-Hudson Psychiatric Center. The records were admitted over defense counsel's objection.

The trial court ignored the opinions of its own court appointed psychiatrists and based its finding of competency on notes made by attendants, whose qualifications were unknown and who had never testified at the hearing. (App. 4.-14a).

The issue of petitioner's competency was properly preserved for review by this Court. The issue was litigated and determined by the C.P.L. § 730 hearing court. The findings of the hearing court are set forth in the accompanying appendix. (App. 4a-14a). Petitioner filed a timely notice of appeal from the judgment and from each and every intermediate order therein made. The issue of petitioner's competency was raised on appeal to the Appellate Division of New York Supreme Court. See Appellant's Brief, Point I, p.22. Specifically, petitioner argued that the hearing court abuse its discretion in finding petitioner competent and,

thereby, petitioner was denied due process of law. Id. at 22-29. The Appellate Division decision affirmed the finding of competence without rendering an opinion as to that issue. (App. 2a). Petitioner filed a timely motion for leave to appeal to the New York Court of Appeals on June 5, 1999. The New York court of Appeals denied leave on August 31, 1999. (App. 1a). Accordingly, this issue is properly preserved for review by this Court.

**The pretrial suppression hearing.**

Upon hearing all of the evidence, the trial court found that all of the evidence supported the conclusion that the arrest was a pretext.

> [T]he conduct of law enforcement authorities throughout the period from November 7, 1988, until defendant's apprehension at approximately 3:00 p.m. on November 11th, was highly indicative of both an intent and a concerted effort to elicit from him an incriminating statement. *Indeed, the record of these proceedings virtually shouts – from the testimony of Charles Madison concerning what he did not tell the police, to the testimony of Det. Speidel concerning what the police did not do upon locating the defendant at the Ranch Motel, to the testimony of Chief Burkhart concerning the purpose of his conversation (i.e., to "wrap up loose ends" and "resolve unanswered questions about New York events") and in recording that conversation (i.e., to preserve defendant's statements as evidence) – that from the beginning, the prosecution was more concerned with acquiring a self-incriminating statement than they were with "public safety"; even to the extent that they were apparently prepared, if necessary, to sacrifice the latter for the former. Consequently, it is quite evident that the questioning*

> *of defendant at the Ranch Motel was, "based upon a need to solve the crime[s] and not upon any objective need to protect the public."* (App. 37a-38a)(emphasis added).

However, the trial court ultimately held that the fact that the arrest may have been a pretext was irrelevant to the suppression analysis. Specifically, the court held that

> Clearly, the New York authorities had probable cause to believe that defendant had committed arson and homicides as early as September 17, 1988, but there is no right to be arrested and a purposeful delay in effecting an arrest to circumvent a suspect's right to counsel is not improper. . . . *Thus, even if the arrest warrant was a pretext, it was irrelevant for the purposes of our analysis herein.* (App. 37a, n.11)(emphasis added).

Based on the foregoing, the trial court denied petitioner's motion to suppress the gun, or any of the other items, seized at the motel on the ground that such evidence was seized incident to "a lawful arrest" in Illinois based on probable cause in New York to believe petitioner had committed homicide in New York State.

Petitioner moved, by omnibus motion, before the trial court to suppress all evidence seized at the time of his arrest as the product of an unlawful arrest. Petitioner's motion was litigated before the trial court which issued a decision on October 25, 1995. (App. 15a-39a). Petitioner filed a timely notice of appeal from the judgment of conviction and from each and every intermediate order therein made. The Appellate Division decision affirmed the decision of the trial court on April 26, 1999. (App. 2a). Petitioner filed a timely motion for leave to appeal to the New York Court of Appeals on June 5, 1999. The New York court of Appeals denied

leave on August 31, 1999. (App. 1a). Accordingly, this issue is properly preserved for review by this Court.

**Mid-trial Publicity**

On Saturday, November 25, 1995, an article appeared on the front page of the New York Times Metro Section entitled, *Murder Suspect Accused of Faking Mental Illness.* (App. 41a-45a). The article cited prosecution sources and referred to "5 suppressed confessions," uncharged crimes in Illinois, and statements by psychiatric "experts," who never examined petitioner or appeared in court to be cross-examined, who claimed that petitioner was faking his mental illness. The article also stated that "Justice James R. Cowhey of the State Supreme Court found [petitioner] competent. . . ." (App. 54a). Finally, the article detailed the story of Ricardo S. Caputo who "was found incompetent to stand trial for murder, only to escape from the mental hospital in Westchester and kill three more people. . . ." (App. 45a). Defense counsel had the article marked as an exhibit and made an application to poll the jury regarding prejudicial media coverage which the trial court denied.

The issue of the prejudicial effect of the article on the jury was raised at trial, at the earliest opportunity. The trial court denied petitioner's application. Petitioner raised the issue again in a motion to set aside the verdict, pursuant to C.P.L. § 330. Specifically, petitioner claimed that the failure to poll the jury denied petitioner a fair trial. The trial court denied of the motion. Petitioner filed a timely notice of appeal from the judgment of conviction and from each and every intermediate order therein made. The Appellate Division decision affirmed the trial court on April 26, 1999. (App. 2a). Petitioner filed a timely motion for leave to appeal to the New York Court of Appeals on June 5, 1999. The New York court of Appeals denied leave on August 31, 1999. (App. 1a). Accordingly, this issue is properly preserved for review by this Court.

## REASONS FOR GRANTING THE PETITION

### I.

### THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS OF THE STATE COURTS CONFLICT WITH DECISIONS OF THIS COURT, HOLDING THAT EVIDENCE SEIZED PURSUANT TO A PRETEXT ARREST MUST BE SUPPRESSED AND THAT PROBABLE CAUSE ALONE WILL NOT JUSTIFY A WARRANTLESS AND NON-CONSENSUAL ENTRY INTO A SUSPECT'S RESIDENCE TO EFFECT AN ARREST, AND ARE OTHERWISE REPUGNANT TO THE FOURTH AMENDMENT'S SAFEGUARDS AND LIMITATIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES.

In an unprecedented abrogation of established Fourth Amendment jurisprudence, the trial court's holding, that the unlawfulness of the methodology employed to seize evidence is irrelevant to ultimate determination of its admissibility, ignores this Court's established precedents in *United States v. Abel, United State v. Lefkowitz,* and *Payton v. New York.* The subsequent failure of the State's appellate courts to address the trial court's fundamentally flawed Fourth Amendment analysis not only conflicts with the decisions of this Court, but is repugnant to the Fourth Amendment and warrants the issuance of a Writ of Certiorari to this Court to permit petitioner an opportunity to have his Fourth Amendment claim heard and determined.

"It is impermissible for law enforcement officers to use an arrest as a pretext to search for evidence." *United States v. Millio*, 588 F.Supp. 45, 49 (W.D.N.Y. 1984), *citing United States v. Lefkowitz, et al.*, 285 U.S. 452, 467 (1932)(Arrest may not be used as a pretext to search for

evidence. Id.); *see also Abel v. United States*, 362 U.S. 217, 234 (1960)(Items seized as a result of an unlawful search should be suppressed as the fruits of an activity in violation of the Fourth Amendment.); United *States v. Prim,* 698 F.2d 972 (9th Cir. 1983)(Existence of a valid non-support warrant could not be used as a pretext to justify detention, interrogation and search of suspect.); *Missouri v. Blair*, 691 S.W.2d 259 (Mo. 1985)(Arrest may not be used as a pretext to search for evidence.), *cert. granted* 474 U.S. 1049, *cert. dismissed* 480 U.S. 698. This court has consistently held that evidence seized as a result of an unlawful arrest is inadmissible. *Brown v. Illinois*, 422 U.S. 590 (1975)(Confession obtained by means illegal detention suppressed, despite the giving of *Miranda* warnings.); *Davis v. Mississippi*, 394 U.S. 721 (1969)(Fingerprints obtained by mean of an unlawful arrest suppressed.); *Dunaway v. New York*, 442 U.S. 200 (1979)(Confession obtained as a result of illegal arrest suppressed despite the giving of *Miranda* warnings.); *see also United States v. Crews*, 445 U.S. 463 (1980)(Exclusionary rule applies to evidence seized during an illegal arrest.). The precedents are clear, evidence seized pursuant to an unlawful arrest is inadmissible.

The evidence that petitioner's arrest pursuant to an Illinois misdemeanor warrant was a pretext was overwhelming. Det. Speidel's claim that petitioner used a probation officer's shield to impersonate a peace officer in order to purchase a can of mace and a slim jim was directly refuted by the testimony of the gun shop owner, Charles Madison. Mr. Madison testified that he spoke with the police alone and that he never told them that petitioner had used a badge to purchase a can of mace and slim jim. (App. 90a, 92a). He further testified that such items could be lawfully purchased by any adult and that his store did not have a policy of asking for any identification if the individual making the purchase was an adult. (App. 92a, 97a-98a). Mr. Madison's testimony directly refuted the affidavit tendered in

support of the misdemeanor warrant. Thus, the warrant itself was void and any evidence seized pursuant to the warrant must be suppressed. *Franks v. Delaware*, 438 U.S. 154 (1978)(Perjurious search warrant affidavit renders warrant void and mandates suppression of seized evidence.). The evidence here must be suppressed as the fruit of a pretext arrest.

The totality of the circumstances surrounding petitioner's arrest establishes that the Illinois B-misdemeanor warrant was procured solely for the purpose of gathering evidence against petitioner. The hearing court found the actions of the New York detectives and the Illinois police were directly exclusively towards gathering evidence relative to the New York homicides. (App. 37a-38a). The New York detectives were in Illinois for the purpose of arresting petitioner. Mr. Madison testified that the New York detectives told him that they were going to arrest petitioner "one way or another." (App. 94a-95a). A courthouse in Winnebago County was opened on Veteran's Day solely for the purpose of issuing a B-misdemeanor warrant. (App. 46a-47a). The warrant fixed bail at $ 25,000. (App. 77a). Police from four different departments met to arrange a tactical plan for executing the B-misdemeanor warrant. (App. 49a). When the police arrived, they surrounded the motel, evacuated the guests and blocked off the street. (App. 48a, 63a-64a). The media was alerted and was present. (App. 64a). Tear gas was employed to force petitioner from the room. (App. 68a). When the police made contact with petitioner, their questions were exclusively confined to the New York homicides. (App. 54a-56a, 70a). Chief Burkhart testified that the purpose of his questions was to "wrap up loose ends" and "resolve unanswered questions about the New York events." (App. 21a). Indeed, Chief Burkhart used a tape recorder for the purpose of preserving the evidence concerning the New York crimes. (App. 54a-56a). Throughout the interrogation at the motel, the police were in contact with A.D.A. Kevin Kennedy

of the Westchester County District Attorney's Office. (Tr. 10/17/95, p.37). The police sought permission for a retroactive eavesdrop warrant[4] from a Illinois States Attorney who was standing by on the phone. (App. 56a). When petitioner was arrested, he not questioned by Illinois officials, but by the New York detectives. The questioning was confined to the New York homicides. When Illinois police wanted to question petitioner concerning alleged armed robberies in Illinois, they were told to seek the consent of the New York detectives. (App. ). Petitioner was never questioned about the alleged impersonation of a peace officer. Petitioner was never prosecuted for the alleged impersonation of a peace officer.

Upon hearing all of the evidence, the trial court found that:

> [T]he conduct of law enforcement authorities throughout the period from November 7, 1988, until defendant's apprehension at approximately 3:00 p.m. on November 11th, was highly indicative of both an intent and a concerted effort to elicit from him an incriminating statement. *Indeed, the record of these proceedings virtually shouts – from the testimony of Charles Madison concerning what he did not tell the police, to the testimony of Det. Speidel concerning what the police did not do upon locating the defendant at the Ranch Motel, to the testimony of Chief Burkhart concerning the purpose of his conversation (i.e., to "wrap up loose ends" and "resolve unanswered questions about New York events") and in recording that conversation (i.e., to preserve defendant's statements as evidence) – that*

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[4] This Court should note that, pursuant to Illinois Law, a retroactive eavesdrop may only be employed to obtain evidence of a felony, not a B-misdemeanor. Ill. Stat. 725(5)/108A-1.

> *from the beginning, the prosecution was more concerned with acquiring a self-incriminating statement than they were with "public safety"; even to the extent that they were apparently prepared, if necessary, to sacrifice the latter for the former. Consequently, it is quite evident that the questioning of defendant at the Ranch Motel was, "based upon a need to solve the crime[s] and not upon any objective need to protect the public."* (App. 37a-38a).

There is no question that the Illinois B-misdemeanor warrant was nothing more than a pretext employed to gather evidence concerning the New York homicides, as the trial court so found.

Independant of whether the facts set forth in the warrant affidavit were false, the use of an arrest warrant to seize evidence relating to an unrelated offense, warrants suppression of the evidence seized. *United States v. Lefkowitz, et al., supra; Abel v. United States, supra.; United States v. Prim, supra.; United States v. Millio, supra.*; *Missouri v. Blair, supra.* Accordingly, the trial court's finding, that the fact that the misdemeanor warrant may have been a pretext was irrelevant to determination of the admissibility of evidence seized at the time of the arrest was not only erroneous, it was contrary to the decisions of this Court and repugnant to the safeguard and limitations imposed by the Fourth Amendment.

Contrary to the trial court's ruling, the existence of unclaimed probable cause to arrest petitioner in New York, if it existed,[5] does not purge the evidence of the taint resulting

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[5] A.D.A. Kevin Kennedy testified at the suppression hearing that probable cause to arrest petitioner for the New York homicides did not exist until after petitioner made incriminating statements during his arrest. (Tr. 10/17/95 p.37).

from the unlawful arrest in Illinois. Petitioner was not arrested on the street, nor was he arrested for a misdemeanor committed in the presence of the officers. The police made a forcible non-consensual entry into petitioner's motel room for the purpose of effecting his arrest. The motel room was, for the purpose of Fourth Amendment analysis, petitioner's residence. *Stoner v. California*, 376 U.S. 483 (1964). In the absence of exigent circumstances, probable cause does not justify a warrantless non-consensual entry into a residence to effect an arrest. *Payton v. New York*, 445 U.S. 763 (1979). Exigent circumstances did not exist in this case. Det. Speidel located petitioner on the 10th of November. (App. 85a). Upon locating petitioner, Det. Speidel, and the local police, withdrew from the motel and left it unguarded until the 11th of November. The police had time to obtain a warrant. In this case, a pretext misdemeanor warrant. If they had time to obtain a pretext warrant, clearly, there were no exigent circumstances present. Thus, the trial court erred in finding that probable cause to arrest petitioner in New York justified a warrantless non-consensual entry into his motel room.

Given that admissibility of the 38 caliber handgun, seized at the time of petitioner's arrest, was critical to the determination of petitioner's guilt, the failure of the trial court to suppress the gun, and other evidence seized at the time of the arrest, denied petitioner a fair trial.

## II.

## THE HEARING COURT ERRED IN FINDING APPELLANT FIT TO STAND TRIAL.

A defendant is incompetent to stand trial if he is unable to consult with his lawyer with a reasonable degree of

rational understanding or fails to demonstrate a rational and factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960). The ability to maintain a working relationship with ones attorney is essential in establishing that a defendant is fit to stand trial. At bar, Dr. Edward Herman and Dr. Harvey Lothringer, the only two court appointed board certified psychiatric examiners, repeatedly unanimously concluded petitioner was incapacitated and unable to assist his attorney due to mental disease. (App. 6a-8a). Dr. Lavian, the only witness called by the prosecution, admitted that he could never engage in a discussion with petitioner. (App. 107a ).. He erroneously relied, as testimony at the § 730 hearing proved, upon the notes of "attendants" at Mid-Hudson, who were never called to testify and whose qualifications were, at best, unknown.

Dr. Lavian was educated in Iran, as an internist, and not board certified in psychiatry. Indeed, he repeatedly failed all of his board examinations(App. 103a), and remained an entry level psychiatrist at Mid-Hudson for nine years without a single promotion. In contrast, both Dr. Herman and Dr. Lothringer were board certified in psychiatry. Dr. Herman was the Director of Forensic Psychiatry for Westchester County Medical Center and had examined over 200 patients for competency hearings and had testified as an expert forensic psychiatrist in over 40 court proceedings. Dr. Lothringer was board certified in psychiatry since 1980 and employed full time at Westchester County Jail as a psychiatrist for over 18 years. He had examined several thousand people for §730 hearings and testified several hundred times in state and federal courts.

The court appointed doctors' unanimous opinion that Petitioner was unable to meaningfully assist his attorney (App. 6a-8a). were based on three clinical examinations, including observations of Petitioner with his attorney. Dr. Lavian never observed Petitioner with anyone. He never examined Petitioner directly. He admitted that there simply

was never a relationship between himself and Petitioner (App. 107a-110a). He admitted he was never able to talk to Petitioner about his feelings about his lawyer. As such, his opinion lacked sufficient foundation and cannot overcome the findings of the two impartial, court appointed doctors.

Dr. Herman testified Petitioner was a paranoid schizophrenic, whose insight and judgment remained significantly impaired throughout three § 730 exams. (App. 6a-7a). After the third exam, Dr. Herman concluded Petitioner was still a paranoid schizophrenic incompetent to assist in his defense Id., found no malingering Id., and corroborated Petitioner's problems in cooperating with his attorney. Id. The hearing judge's complete disregard of the credible, unbiased determinations of the two board certified, court appointed, impartial psychiatrists requires a reversal of the finding of competence.

Dr. Lavian's erroneous determination was premised on purported third-party observations, which were later proven false. Dr. Lavian testified that he believed Petitioner able to assist his attorney because he had been seen by an anonymous attendant (never called as a witness) conversing "appropriately" with his attorney at the Psychiatric Center. Dr. Lavian testified, as if he had been there, "I do remember that when his lawyer came to see him ... [Petitioner] was fully cooperative." On cross-examination, Mr. Aurnou asked if that attorney was himself. Dr. Lavian answered, "I don't know." "It was documented by my staff." "Personally, I did not see," but I was told "he was very appropriately with him, with his lawyer ..." . The defense called Thomas Ciganek, attorney for the executor of Petitioner's mother's estate, who visited Petitioner on May 12, 1994. Mr. Ciganek testified that Petitioner's conduct was oblivious, irrational and unresponsive, and that he found it difficult "to carry on with him any kind of conversation whatsoever." Diane Kurisko, a disinterested bank officer who had accompanied attorney Ciganek to attest to the execution of documents, corroborated

the attorney's account. Ms. Kurisko testified that Petitioner was incoherent and unresponsive and failed to engage in an intelligent conversation with either her or Mr. Ciganek. This was the only verifiable instance Dr. Lavian could recall supporting his opinion that Petitioner could meaningfully assist his counsel. Dr. Lavian's hearsay was unquestionably thoroughly demolished as a foundation for conjecture as to Petitioner's mental state. Indeed, the incident on which Dr. Lavian most prominently buttressed his "professional opinion" was the best evidence of the lack of foundation and unreliability of his testimony! _Dr. Lavian admitted that he was unable to interact with Petitioner due to his medical condition. He relied entirely on hearsay lay third party observations. He admitted there was no psychological testing conducted at Mid-Hudson at any time during Petitioner's confinement there.

This Court has declared expert psychiatric opinions based on hearsay unpersuasive., 440 U.S. 1301 (1979). In Evans, "...this Court [was] not persuaded that [the defendant] is incompetent merely from a professional opinion rendered on hearsay information." Id at 1305. At bar, this is exactly what the hearing court relied upon to reach its erroneous determination. The overwhelming evidence required a finding of incompetence. *Strickland v. Francis*, 738 F.2d 1542 (11th Cir. 1984). held that a state court finding of competence could not be upheld in light of the fact that both experts for the defense were "state employees and had examined [the defendant] under a court order to assist in reaching a competency determination." Id at 1544. That is precisely what happened here! Although seven witnesses testified for the state in *Strickland*, the court held that the possibility of bias combined with inferior qualifications could not successfully overcome the court appointed examiners' conclusions. Here, an ill-qualified witness, lacking any personal contact with Appellant was the state's only witness. The competency determination here is in direct conflict with

the holding of the 11th Circuit in Strickland, supra. The Rule 10(b) conflict warrants certiorari.

Dr. Lavian's conclusion was nothing more than a self-serving testament to his own ability to achieve in a few months without treatment or medication what Illinois psychiatric hospitals had been unable to achieve for years. Indicative of Dr. Lavian's bias is his admission that he had determined that Petitioner was fit to stand trial in April of 1994, before he was even returned to the psychiatric center for treatment! (Tr. 9/30/94, p 174). At Mid-Hudson, Appellant received no treatment, and was regarded as an uncooperative troublemaker, of whom the staff was anxious to be rid.( Section 730 Hrg. decision, App. 10a., citing, progress notes 4/16/94, 4/21/94). By comparison, Dr. Lothringer and Dr. Herman, the court appointed, county employed, impartial board certified psychiatrists, had absolutely no interest whatsoever in finding Petitioner incompetent.

Conviction of a legally incompetent defendant violates due process by depriving the defendant of his constitutional right to a fair trial. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). At bar, the hearing judge's opinion recited three pages of "progress notes" memorializing lay opinions and observations of lay employees at Mid-Hudson. Defense counsel vehemently objected to its introduction because none of the declarants were legally qualified to render psychiatric opinions nor did they testify at the competency hearing. Dr. Lavian admitted a high school degree was not required to obtain the declarant's positions at Mid-Hudson, and that, like himself, none of them managed to establish a relationship with Petitioner regarding his mental condition. Petitioner was denied his right to confront and question his unqualified accusers. The finding of competence must be vacated. *Strickland v. Francis, supra.*

Both the hearing judge and Dr. Lavian based their finding on random selections from these unsworn, anonymous

amateur conclusions. Constitutional Due Process requirements notwithstanding, Petitioner was never afforded the opportunity to question the individuals whose lay "observations" were afforded controlling weight to the entire exclusion of all board certified court appointed experts and live disinterested witnesses who did, in fact, interact directly with Petitioner; and who testified and were cross-examined under oath at the hearing. Admission of and reliance upon this selectively chosen unfounded hearsay cannot be deemed harmless error.

Both court appointed psychiatrists agreed that Petitioner was incapacitated. Despite this, the hearing judge chose to rely on erroneous and unsubstantiated hearsay. By ignoring the testimony of its own experts, the hearing court's decision is in direct conflict with the 11th Circuit's holding in Strickland. The hearing judge's decision should therefore be vacated.

## III.

## THE COURT'S REFUSAL TO POLL THE JURY CONCERNING MID-TRIAL PUBLICITY (WHICH CITED PROSECUTION SOURCES, REFERRED TO SUPPRESSED CONFESSIONS, INADMISSIBLE UNCHARGED CRIMES, AND STATEMENTS BY GOVERNMENT OFFICIALS AND EXPERT WITNESSES WHO NEVER TESTIFIED AT TRIAL) DENIED APPELLANT A FAIR TRIAL AND WARRANTS THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO ORDER A NEW TRIAL.

The trial court's refusal to poll the jury after a highly prejudicial article appeared on the front page of the New York Times Metro Section, on the eve of presentation of petitioner's psychiatric defense, was an abuse of discretion and warrants the exercise of this Court's supervisory powers to order a new trial.

Trial judges have broad discretion in ruling on the prejudice resulting from news article and other publicity. *Holt v. United States*, 28 U.S. 245, 248 (1910). However, where the jury is exposed "to information . . . so prejudicial it could not be directly offered as evidence . . . , [t]he prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence." *Marshall v. United States*, 360 U.S. 310, 312-13 (1959).

Petitioner was denied due process and a fair trial when the court refused to question the jury about a highly prejudicial article that appeared in a widely locally distributed prominent national newspaper the day before the defense was to begin its direct case. The article contained extremely prejudicial information concerning five suppressed confessions, inadmissible uncharged crimes, and statements by government authorities and "expert" witnesses who never testified at trial and were therefore never cross-examined.

On Saturday, November 20, 1995, the New York Times published a story headlined, Murder Suspect Accused of Faking Mental Illness. (App. 40a-43a). The next Monday, defense counsel brought the article to the attention of the court and asked for the jury to be polled to ascertain whether any jurors had read the article. The request was especially reasonable given the large local circulation of the paper in which the article appeared and which jurors had previously admitted they regularly read. The court denied the application. The court's refusal to grant the application was based upon the trial court's ostrich like acknowledgment that the article was prejudicial and its "reasoning" that any query would "exacerbate an already difficult situation." (Tr. 11/28/95, p 1341). The court also noted that it had instructed the jury several times throughout the trial not to read anything about the case. (Tr. 11/28/95, p 1341).

A jury must remain capable of rendering a fair and objective verdict according to the evidence throughout the

entire trial. *People v. Genovese*, 10 N.Y.2d 478,485; 225 N.Y.S.2d 26, 180 N.E.2d 419 (1962). At bar, the question as to whether the jury was able to render a fair and objective verdict is unanswerable from the record due to the court's refusal to question the jury. The Second Circuit has articulated a three-step process to be used to evaluate the possibility of prejudice resulting from mid-trial media reports. *United States v. Gaggi*, 811 F.2d 47,51 (2d Cir. 1987), *cert. denied*, 482 U.S. 929 (1987). The *Gaggi* court held that the process first entails evaluating whether the coverage has potential for unfair prejudice; second, canvassing the jury to find out if they have learned of the potentially prejudicial publicity; and third, examining individually exposed jurors C outside the presence of the other jurors. Id This approach is followed by numerious other Courts of Appeals. *See e.g, Government of Virgin Islands v. Dowling*, 814 F.2d 134, 139-41(3rd Cir.1987); *United States v. Crowell*, 586 F.2d 1020 (4th Cir. 1978); *United States v. Herring*, 568 F.2d 1099, 1104-05 (5th Cir. 1978); *United States v. Trapnell*, 638 F.2d 1016, 1022 (7th Cir. 1980); *United States v. Hood*, 593 F.2d 293, 296 (Th Cir. 1979); *United States v. Alpert*, 712 F.d. 388, 389 (Th Cir. 1983); *United States v. Thomson*, 908 F.d.. 648 (10th Cir. 1990). The trial court's refusal to make any inquiry about the concededly prejudicial article mandates reversal.

Clearly the Times article had the potential to unfairly prejudice Petitioner. Indeed, the trial court admitted that publicizing the content of the article would exacerbate a difficult situation. The article referenced inadmissible confessions and uncharged crimes in this very case and painted an overall picture of Petitioner feigning psychological problems. In addition, the article recited inadmissible hearsay statements by an Illinois prosecutor as to his belief that Petitioner was always competent to stand trial. (App. 40a-43a). Clearly an article of this nature – one that attacks a potentially viable defense and references inadmissible evidence – has the potential to unfairly prejudice the

defendant. *See United States v. Caldwell*, 776 F.d. 989, 998 (11th Cir. 1985); *United States v. Harris*, 908 F.d. 728, 734 (11th Cir. 1990) (Potential for jury contamination is especially serious where alleged extrinsic evidence is involved). As such, the trial court was obligated to question the jury to see if anyone had learned of the prejudicial material. Its failure to do so constitutes a clear abuse of discretion. The trial court's refusal to take any steps to protect Petitioner's right to a fair trial after the article was timely brought to its attention on the record requires reversal. Had the court polled the jury and followed the process articulated in Gaggi, it would have been able to make an informed decision as to how best to protect Petitioner's rights. The trial court simply and inexcusably refused to make the inquiry mandated by the law and by the circumstances timely called to its attention by defense counsel. In essence, the trial court's failure to address the mid-trial publicity foreclosed Petitioner's ability to effectively defend the charges against him. Moreover, the article, if read by any juror, clearly precluded a fair and objective verdict based only upon the evidence at trial. The trial court was obligated to grant defense counsel's application to poll the jury once it determined that the article was potentially prejudicial to Petitioner. The article was unquestionably prejudicial. Because the trial court abused its discretion in failing to take the steps mandated by law and the facts timely brought to its attention, a new trial is required. The failure of the trial court to poll this jury, and the affirmance of that ruling by the Appellate Division, directly conflicts with the cited decisions of the Federal court of Appeals for the d., 3rd , 4th, 5th, 7th, Th, Th and 10th circuits, so as to warrant certiorari under this Court's rule 10(b).

## CONCLUSION

The Petition for a Writ is meritorious and should be granted.

Respectfully submitted,

Joel Martin Aurnou
Attorney for Petitioner
180 East Post Road
White Plains, New York 10601
(914) 993-0400

# APPENDIX

**State of New York**
**Court of appeals**

BEFORE: HON. JUDITH S. KAYE, Chief Judge

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THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

RAYMOND MACARO,

Appellant.

CERTIFICATE DENYING LEAVE

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I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, * there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York

August 31, 1999

Judith Kaye
Chief Judge

* An Order of the Appellate Division, Second Department, entered April 26, 1999, affirming a judgment of County Court, Westchester County, rendered February 20, 1996.

*Description of Order:

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

____ AD2d ____ Argued - March 16, 1999

SONDRA MILLER, J.P.
CORNELIUS J. O'BRIEN
DAVID S. RITTER
FRED T. SANTUCCI, JJ.

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96-02593

The People, etc., respondent, DECISION & ORDER
v Raymond Macaro, appellant.
(Ind. No. 88-01658)

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Joel Martin Aurnou, White Plains, N.Y. (Kieran J. Sullivan of counsel), for appellant.

Jeanine Pirro, District Attorney, White Plains, N.Y. (Richard Longworth Hecht, Maryanne Luciano, and Richard E. Weill of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester County (Leavitt, J.), rendered February 20, 1996, convicting him of murder in the second degree, manslaughter in the first degree, criminally negligent homicide, arson in the third degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Viewing, the evidence in a light most favorable to the prosecution (see, *People v. Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt on the charge of criminally negligent homicide beyond a reasonable doubt *(see, People v Rossey*, 89 NY2d 970). Further, upon the exercise of our factual review power, we are satisfied that the verdict of guilt on that charge was not against the weight of the evidence *(see,* CPL 470.15[5]).

The sentence imposed was neither illegal nor excessive *(see,* Penal Law § 70.25[2]; *People v. Suitte*, 90 AD2d 80).

The defendant's remaining contentions are either unpreserved for appellate review, without merit, or do not warrant reversal of his conviction.

S. MILLER, J.P., O'BRIEN, RITTER and SANTUCCI, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

April 26, 1999

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK
- against -
RAY J. MACARO, JR.
Defendant.

Decision /Order
Ind. #88-1658
ENTERED ON
1/23/95
WESTCHESTER
COUNTY CLERK

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COWHEY, J.

Defendant is charged in this ten count indictment with six counts of Murder Second Degree relating to the deaths of defendant's father and two aunts on September 16, 1988; as to each death defendant is charged with Intentional Murder and Depraved Mind Murder. Following his alleged acts he left New York and was arrested about two months later in Illinois where he was charged with a number of robberies. He was found incompetent to stand trial in Illinois and spent approximately 4 years in a psychiatric hospital before being returned to New York to face the charges in this indictment.

He was arraigned before this Court on November 17, 1992, pleading not guilty to all charges. Thereafter, a 730 examination was conducted by two psychiatrists at the Westchester County Jail, namely Harvey Lothringer, M.D. and Howard Herman, M.D. Both psychiatrists rendered their reports and findings on January 8, 1993, both psychiatrists concluding that he lacked capacity "to assist in his own defense". On February 1, 1993, at a scheduled court date, as neither the District attorney nor defendant's attorney requested a hearing this Court issued an order of commitment pursuant to CPL Sections 730.50(1) and

730.30(3).

Pursuant that commitment, defendant remained under the care and custody of the Mid-Hudson Psychiatric Center from May 19, 1993 to February 4, 1994 on which date he was found competent and discharged for return to Westchester County for trial. On March 8, 1994 defendant's attorney requested a second 730 examination; the request was granted. The same psychiatrists who had rendered reports of incapacitation on January 8, 1993 again examined defendant and on March 29, 1994 submitted new reports, again finding defendant incapacitated. On April 8, 1994 these conclusions were again not controverted and defendant was remanded to the Department of Mental Hygiene pursuant to Article 730. He was returned to Mid-Hudson Psychiatric Center from April 14, 1994 until his discharge upon a finding of competence on June 27, 1994.

Upon his return for trial defense counsel requested a third 730 examination, which was granted by the Court. Once again, the two same psychiatrists examined defendant and submitted reports dated August 18, 1994, finding for the third time that defendant was incapacitated. A competency hearing was requested and directed by the Court. The competency hearing commenced on September 19, 1994 and continued on September 20, September 30, October 18; it concluded on November 1, 1994. The People called Dr. Manouchehr Lavian, a psychiatrist at Mid-Hudson Psychiatric Center. The defense called Drs. Edward R. Herman and Harvey Lothringer, the aforementioned psychiatrists who examined defendant pursuant to Article 730 and, in addition, a bank employee and an attorney who had briefly visited defendant at Mid-Hudson Psychiatric Center

on May 12, 1994 for execution of certain legal documents.[1] All 730 reports, hospital records of defendant's first and second admissions to Mid-Hudson Psychiatric Center including clinical summaries, psychiatric evaluations, treatment plan reviews and progress notes were admitted into evidence. Records concerning defendant's psychiatric confinement in Illinois were also received in evidence.

Dr. Lavian testified that he has been employed at Mid-Hudson Psychiatric Center since 1985; that he was the attending psychiatrist when defendant was admitted (for the second time) on April 14, 1994; that he reviewed the records of defendant's first confinement at Mid-Hudson from May 19, 1993 to February 4, 1994 and the psychiatric records from Illinois. He stated defendant is a very intelligent person, has no known psychiatric hospitalization prior to 1988, is oriented as to place, person and time and shows no psychotic symptoms. His diagnosis under Axis II is "personality disorder, not otherwise specified". He further testified that defendant denied hallucinations or any other symptoms indicating paranoid schizophrenia; that he was heard giving advice to other patients; that he was totally uncooperative with him. In his opinion, defendant, if he chose, could cooperate with his lawyer, but was malingering and manipulating the system; that he was competent to stand trial as of his date of discharge on June 27, 1994.

Dr. Herman testified as to his examinations of defendant on January 8, 1993, March 29, 1994 and August 18, 1994. His January 8, 1993 report indicates "an extensive psychiatric history with multiple hospitalizations"; that his speech was clear and coherent but tangential; that he had no

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[1] Their testimony was only relevant to this hearing as a refutation of statements in the record that defendant had conducted legal business with them in a positive manner. At best, such claims were hearsay and do not directly bear upon the issue of competency before the Court.

hallucinations but felt "grandiose and persecutory delusions. His diagnosis was "schizophrenia, paranoid type". He concluded that defendant was "unable to assist in his defense because of his extensive delusional system and thought disorder".

His second report on March 29, 1994 noted "paranoid delusions regarding attorneys and hospitals" but conceded "no hallucinations" and that defendant is "alert, oriented to month and year, place and person". He further found defendant understood the charges but that his "ability to assist in his defense is severely impaired due to extreme paranoid delusions concerning his attorney, as well as attorneys in general". He concluded that defendant was not fit to stand trial.

Dr. Herman's last report on August 18, 1994 concedes defendant "is able to state what his charges are" but "he has difficulty in verbalizing details in a coherent manner". His diagnosis was again "schizophrenia paranoid type". On cross-examination he conceded defendant was a person of "high intelligence;" that he had been a senior probation officer with Westchester County for over 15 years; that unquestionably he understood the nature of the charges against him but that defendant was distrustful of all attorneys, argumentative and suspicious of others. On redirect by defense counsel he was unable to state whether the trial might have any effect on defendant's mental status.

Dr. Harvey Lothringer testified concerning his three 730 examinations of defendant. His January 8, 1993 report found defendant "preoccupied with persecutory delusions regarding treatment of himself and all inmates"; that defendant stated he was "competent and ready for trial"; that he understood the charges, namely that he was accused of three homicides but concluded he was "unable to assist in his defense because of the intrusion of his persecutory thoughts and preoccupations". On March 29, 1994 Dr. Lothringer again found defendant "unable to cooperative (sic) with an

attorney in his defense ... because of his paranoid delusions". His diagnosis was "paranoid schizophrenia". His last report of August 18, 1994 found defendant's replies..."extremely tangential" although "less so than on prior examination on 3/29/94"; that he was "not certain if he can cooperate with his present attorney. Does not know if he is ready to go to trial. Unable to trust his attorney."

On cross-examination Dr. Lothringer conceded defendant was alert, oriented and of above average or superior intelligence, that he expressed displeasure with his present attorney on all three interviews; that he was aware he was charged with three murders and the consequences of conviction. His diagnosis was "schizophrenia, paranoid types;" that defendant has a personality disorder. Curiously, Dr Lothringer volunteered that he can render his psychiatric opinion and a diagnosis in less than 5 minutes and usually in less than 30 seconds!

The "Clinical Summary" on defendant's first confinement at Mid-Hudson Psychiatric Center shows that upon admission he immediately made it clear he was not going to cooperate with psychiatric or other medical procedures and refused to give a history or discuss the criminal case against him; that be had no trust or respect for psychiatry and/or lawyers. His orientation and memory were intact, his affect was appropriate; his mood contained anger. He gave lengthy and digressive responses to questions seemingly to impress others. He had five years of college, receiving a Bachelors Degree in History from the University of Pittsburgh and his "intelligence rating was superior". Throughout his hospital stay he refused to discuss his legal situation. He was not delusional but was highly suspicious and argumentative. The initial diagnosis of paranoid disorder was discontinued as the patient was or observation found not delusional and was given the principal diagnosis on Axis II of "paranoid personality disorder."

The "Clinical Summary" on his second confinement

at Mid-Hudson Psychiatric Center between April 14, 1994 and June 27, 1994 notes that on admission he was 51 years old, refused to answer any questions and was uncooperative but that he "indicated no signs of agitated or aggressive behavior"; that "his uncooperative behavior was volitional." He was observed by staff consulting with other patients and giving them advice about their rights. He refused all medications, showed no signs of acute psychotic symptoms, and chose to not cooperate with the "treatment team" or his lawyer. The report further found he was familiar with the rules and functions of the court personnel, including the judge, prosecutor and defense attorney and "can quote different elements in criminal and civil law and takes great pride in doing so"; that he is deliberately avoiding facing his charges by his unwillingness to cooperate; that he was "capable of understanding the proceedings as well as cooperating with his counsel if he wants to". A Team Meeting report on May 11, 1994 notes he was "observed by staff advising peers, displaying no signs of acute psychotic symptoms"; by unanimous decision defendant was presented for Case Review, which interview was conducted on May 12, 1994 by a Dr. Salunan (Unit Chief) who found defendant's "uncooperativeness was volatile in order to avoid facing the charges in the court. He has used different strategies to approach the staff on different admissions". He recommended further observation of defendant by the Team. His pattern of uncooperativeness is recorded on records from the Illinois Psychiatric Center in 1989 and 1990 where he was described as "very stubborn, uncooperative and guarded individual who (refused) treatment all along in spite of being totally aware of his responsibility, being alert, oriented and lucid." Records from Illinois show defendant "knows a great deal, the rules and functions of the court personnel such as a judge, the State attorney and Defense Attorney...that he is expected to tell his attorney the circumstances (of his case)."

A "Psychiatric Evaluation" at Mid-Hudson Psychiatric

Center dated April 18, 1994 indicates: "He does not believe he has mental illness. He, however, understands very well the consequences of his actions. Though he remains hostile to attending physician and other staff, he knows his limits. "; that observation on his prior confinement at Mid-Hudson showed 'that although he shows some paranoid ideas and is distrustful to others, he knows his charges and court procedures clearly and coherently. He, however, chose not to cooperate with his lawyer and with treatment team members. He has been refusing any treatment modalities which is a characteristic of people who are suffering from paranoid delusional disorder ... it is our team's opinion that he knows his charges and court procedures and is able to cooperate with his lawyer if he chooses to do so." (Signed by Dr. Lavian on April 22, 1994).

A "Treatment Plan Review" at Mid-Hudson Psychiatric Center dated May 21, 1994 indicates defendant "interacts with selected peers" and though he "consistently refuses to discuss his charges with the staff " he is "aware of the charges and if he chooses is capable of assisting his attorney in planning his defense."

"Progress Notes" on various dates during defendant's last stay at Mid-Hudson Psychiatric Center contain the following:

> 4/14/94:"Pt. calm, but angry during admission interview. Pt. knows his charges, but refuses to talk to interviewer about them."
>
> 4/16/94: Defendant "stated that he had 'fired' Dr. Lavian as his doctor." "Pt. is a known malingerer. and trouble-maker... Pt. continues to be monitored closely for his manipulative behavior... Refuses to discuss his legal issues."

4/19/94: Defendant was requested to participate in psychological testing (and responded) "shove it"; he "refused" to participate in any testing whatsoever.

4/21/94: Defendant is a "father/counsellor" on the ward and "interacts well with his peers" to help with legal concerns" but "refuses to discuss his charges or relevant courtroom procedures and has refused all standard medical tests" and is "unwilling to participate in any psychological testing (and) refused psychotropic medication".

"This patient has been refusing any treatment modalities for the last several years. . . [he] shows no evidence of disorganized thoughts (and) is aware of his charges and court procedures..."

"Pt. voluntarily refuses to cooperate with the Team..."

4/30/94: "Pt. at times can be heard telling other patients about their legal situations possibly offering advice but when it comes to his own case he clams up and will not discuss his charges though...he does have full understanding of court system."

5/2/94: "He continues to refuse for complete admissions physical examination."

5/3/94: "He is angry with his attorney and basically is aware that he is facing a long sentence in prison."

5/12/94: "Pt. continues to influence other pts. with 'tips' on legal matters whenever he can."

5/19/94: "If he chose he can cooperate with his attorney."

5/20/ 94: "Pt. continues to refuse all treatment modalities offered by staff."

5/22/94: "Pt. totally refuses to discuss his charges with staff. Pt. does not interact well with staff and only interacts with a select few patients."

5/24/94: "This patient continues to remain selectively cooperative... continues to refuse to discuss his charges although he is aware of his charges. He is facing very serious charges and appears extremely anxious to return to court. If he chooses he is capable of assisting his attorney in planning his defense."

5/28/94: "Patient has displayed no signs of acute psychotic symptoms, has been observed to advising peers of their rights and legal needs and has been selectively uncooperative with staff in order to prevent him from going back to court."

6/6/94: "He appears highly manipulative and unwilling to properly proceed with his legal case. When discussing his charges he becomes very tangential. He is aware of his charges and courtroom proceedings but may remain uncooperative with his attorney because he does not want this case to

proceed."

6/14/94: "Pt. observed on ward to be discussing his peers cases with them often 'advising' them in that area... Pt. fully aware of legal system."

6/15/94: "Pt. continues to refuse to cooperate ... Pt. continues to counsel other pt.'s of their 'rights' and options they have to refuse to cooperate with staff. Pt. interacts with only those other pts. and staff that he chooses to and for his own specific reasons. Pt. refused to discuss his charges, although he readily admits knowing charges...'better than you do'".

6/21/94:"Pts. behavior remains the same...continues not to anything to do with the team...refuses to discuss anything- about his case with anyone. Pt. will talk with peers about their situation and legal matters and is occasionally overheard trying to advise others with their cases. "

The People bear the burden of proof by a preponderance of the evidence that defendant is not an incapacitated person within the meaning of CPL Section 730.10(1) . An " incapacitated person" is a defendant who as a result of mental disease lacks the capacity to understand the proceedings or to assist in his own defense.[2] In People v. Valentino, 356 NY2d 962 (Nassau County, 1974), the Court

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[2] Although the definition also includes mental defect this is concededly inapplicable to the instant case.

noted six factors which bear some consideration in determining the question of competence:

1. Is defendant oriented as to time and place?
2. Can defendant perceive, recall and relate?
3. Does defendant have a rudimentary understanding of a criminal trial and the roles of the judge, jury, prosecutor and defense counsel?
4. Can "defendant if he wishes establish a working relationship with his attorney." (Emphasis supplied).
5. Does defendant have sufficient intelligence and judgment to listen to his attorney?
6. Will his mental state enable him to withstand the stresses of a criminal trial without suffering a serious prolonged or permanent breakdown?

All six "factors", although not necessarily conclusive, were adopted by the Appellate Division, Second Department in People v. Picozzi, 106 AD2d 413 (1994). In our case, the only one really in dispute is No. 4, that is, whether or not defendant can, "if he chooses", assist in his own defense by cooperating with his attorney. Based upon the testimony adduced at the hearing and upon the records introduced into evidence, this Court must conclude the People have met their burden. Defendant by intentionally refusing medication, psychological testing, and cooperation with the "Team" during his two confinements at Mid-Hudson Psychiatric Hospital purposely manipulated the legal system for his own goals. Defendant does not suffer from any mental disease and, in any event, this Court finds he has the capacity to understand the proceedings against him and, if he chooses, to assist his attorney in the defense of the charges in this indictment.

Accordingly, as the People have met their burden of proof by a preponderance of the evidence as to defendant's competency to stand trial, this case shall proceed to trial.

This constitutes the findings of fact and conclusions of law at this hearing and is the order of this Court.

DATED: White Plains, New York
January 23, 1995

s/JAMES R. COWHEY, J.S.C

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COUNTY COURT : WESTCHESTER COUNTY
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER
- against - Indictment No. 88-1658
Entered 10-25-95
RAY J. MACARO, JR., Westchester
Defendant. County Clerk

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LEAVITT, J.

By prior decisions and orders of this Court, consolidated pre-trial hearings were conducted on August 8, 9, 10, 11, 14, 16 and 18 and, October 17 and 18, 1995, on defendant's motions to suppress tangible evidence and statements, Chief of Police Charles Burkhardt of the Belvedere, Illinois, Police Department, Detective David Speidel of the Eastchester, New York, Police Department and Investigator John O'Donnell of the Westchester County District Attorney's Office, testified for the prosecution. Messrs. Charles Madison, Frank Cushing, Michael Ciesecke and Gerard Damiani, Esq., and Assistant District Attorney Kevin Kennedy of the Westchester County District Attorney's Office, testified for the defense. The defendant elected not to take the stand. The Court makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

During the early morning hours of September 17, 1988, Detective Speidel received a telephone call at his home concerning a fire at a private residence located at 19 Columbus Circle in Eastchester. In response to the telephone call, Det. Speidel arrived at 19 Columbus Circle some time

between 6:00 a.m. and 7:00 a.m. where he found fire and police personnel fighting a conflagration which was brought under control later that same morning. Det. Speidel learned that one Sylvia Bennett had been taken from the premises to a hospital. Upon entering the premises, Det. Speidel observed two (2) bodies at the foot of the stairs descending from the ground floor to the basement area. No other bodies were discovered. Det. Speidel had personal knowledge, prior to September 17, 1988, of defendant and defendant's parents, and that all three resided at the 19 Columbus Circle house. He recognized one of the bodies as Rafael Macaro, Sr. - defendant's father - and assumed the second body was defendant's mother. Det. Speidel later learned, however, that Mrs. Macaro had been hospitalized at the time of the fire; the second body was subsequently identified as defendant's aunt, Regina Deine.

Also on September 17, 1988, the Arson Fire Task Force conducted an investigation of the scene and preliminarily determined that the fire had been intentionally started from four (4) points of origin within the house. On that date, Det. Speidel saw, and recovered, from the premises three (3) gasoline cans, and a set of broken dentures which were floating in the water from the fire hoses which had flooded the basement. Later that afternoon or early evening Det. Speidel and A.D.A. Kennedy applied for three (3) warrants which were issued by the Hon. Joseph K. West, Judge of the County Court, Westchester County, authorizing, respectively, the search of defendant's person and two (2) cars owned by defendant - neither vehicle was at 19 Columbus Circle when Det. Speidel arrived on the 17th.

On September 18, 1988, Det. Speidel was advised by Dr. Louis Roh of the Medical Examiner's Office that the deaths of Sylvia Bennett and Rafael Macaro, Sr., had been caused by blunt force trauma, and that the death of Regina Deine had been caused by blunt force trauma and two (2) gun shot wounds to the head. A search warrant was applied

for, and issued, for the New York County residence of Sylvia Bennett.

On September 19, 1988, Det. Speidel returned to the premises at 19 Columbus Circle, and found and seized therefrom a hammer, work gloves and a plastic bag containing a white jacket, a shoe and a set of dentures. He also found a baseball bat with a stain on it, but left it for examination in place by personnel from the Westchester County Department of Forensic Laboratories. The bat was seized by said personnel on September 20, 1988. The premises were continually secured by law enforcement authorities from September 17 to 23, 1988, but no application for a warrant to search said premises was ever made. Nor do the People aver that any attempt was ever made to seek the consent of defendant's mother therefore.

At approximately 7:30 p.m., on November 7, 1988, Mr. Madison, President of Madison's Gun Shop in Loves Park, Illinois, received a telephone call from Lt. Johnson of the Loves Park Police Department. Pursuant to this conversation, Mr. Madison met with Lt. Johnson and, "two other men from New York", at the gun shop later that evening. The New Yorkers told Mr. Madison that Ray Macaro, Jr., had killed his family and set fire to his house in New York. A person who had identified himself as Ray Macaro, Jr., had been in the gun shop on one occasion approximately two to three weeks previously. According to Mr. Madison, this person had left a shotgun to be repaired and several firearms on consignment.

In answer to their questions, Mr. Madison also told his visitors: that Mr. Macaro had purchased a "slim jim" - i.e., a device used to gain entry to a locked automobile - and mace; that, Macaro had not identified himself as a peace officer, and; that Mr. Macaro had not displayed to him any kind of badge or shield such as might be issued to a law enforcement officer. When asked if he knew Mr. Macaro's whereabouts, Mr. Madison told them he did not, but that

Mr. Macaro was bound to return to the gun shop to collect money due him from the sales of his guns.

Det. Speidel testified that he and Investigator John Bocskay of the Westchester County District Attorney's office were the two men from New York who met with Mr. Madison on November 7, 1988. Mr. Madison testified that he was alone when he met with Lt. Johnson, Det. Speidel and Inv. Bocskay. Det. Speidel, however, testified that Mr. Madison's brother, James Madison - who was not called as a witness - was also present and that James Madison told the officers that Mr. Macaro had identified himself as a peace officer and displayed a shield when he purchased the "slim jim" and mace.[1] Det. Speidel also testified that prior to his trip to Illinois, pursuant to discussions between personnel from the Eastchester Police Department and the Westchester County District Attorney's Office, a decision had been made that a criminal complaint would not be filed against, and a warrant would not be sought for the arrest of, Ray Macaro, Jr., in connection with the events of September 17, 1988; and that neither of these actions had been undertaken as of November 7, 1988. With the cooperation of local authorities, the gun shop was placed under surveillance on November 7, 8, 9 and 10, 1988, but defendant was not observed in the vicinity.

On November 10, 1988, one of defendant's automobiles was seen at the Ranch Motel and, prior to 7:00 p.m. that day, the motel owner identified defendant as the occupant of one of the rooms from a photograph shown to

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[1] Curiously, Charles Madison testified that: no law restricts the sale of either a "slim jim" or mace to a peace officer in the State of Illinois; that he had sold such items to non-peace officers on many occasions, and; there would have been no reason for defendant to have represented himself as a peace officer in connection with such purchases. This testimony was entirely uncontroverted.

him by Det. Speidel and local authorities. According to Det. Speidel, he and the local officers with whom he was working, surmised that defendant probably felt "secure" at the motel, so no attempt to apprehend him was made that night.

O)n the morning of November 11, 1988, Det. Speidel accompanied Lt. Johnson to Winnebago County where they located a superior court judge - November 11, 1988, was Veteran's Day, a legal holiday in the State of Illinois, and the courts were not in session[2] - who, upon their affirmations, issued a warrant for the arrest of Ray Macaro, Jr., for the class 3 misdemeanor of False Personation of a Peace Officer at Madison's Gun Shop. The officers then returned to the Boone County Public Safety Building - which housed the City of Belvedere Police Department and Boone County Sheriff's Department as well as the Boone County Jail where they met with chief Burkhardt, the Boone County Sheriff and other representatives of various local law enforcement agencies.

Between 12:15 P.M. and 12:30 p.m. on the 11th, approximately fourteen (14) armed officers from various agencies - including the Belvedere Police Department, the Loves Park Police Department, the Boone County Sheriff's Department, Det. Speidel and Inv. Bocskay - arrived at the Ranch Motel to execute the Winnebago County arrest warrant. The motel was surrounded and all its occupants, save defendant, were evacuated. A Boone County Deputy Sheriff, using a loudspeaker, then called defendant by name, asked him to exit his room and advised him that he was "under arrest." When fifteen (15) minutes had passed without any response from inside the room, tear gas canisters

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[2] Moreover, since November 11th was also a Friday, no courts would be in session until November 14, 1988.

were shot through the window and door. As no response was yet forthcoming, at approximately 1:30 p.m. the assembled officers decided to enter the room by force and one of them kicked in the door.

The officers observed defendant, who appeared to be armed with one or more firearms[3], run into the bathroom. Two (2) or three (3) more tear gas rounds, and one (1) or two (2) tear gas grenades, were shot into the room.[4] At approximately 2:00 p.m. all water and ventilation in defendant's room were shut off. At approximately 2:30 p.m., Chief Burkhardt, and other officers, entered the room and tried, unsuccessfully, to force open the bathroom door. They heard, "Get back. Get back", from inside the bathroom, exited the room and took up positions just outside the door. Chief Burkhardt, who was closest to the door, then told defendant that "it was over" and that he should come out. From behind the bathroom door, defendant responded that, "It'll be over soon", and then they could come and get him.

Chief Burkhardt testified that he believed that defendant intended to kill himself. At that point Chief Burkhardt asked defendant why he was in Illinois and thereby initiated a conversation with defendant which lasted approximately one-half (½) hour. Throughout this conversation, according to Chief Burkhardt, his purpose and intent was to "wrap up loose ends", and "resolve unanswered questions about the New York events", and he was aware that his questions could elicit incriminating responses from

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[3] According to Det. Speidel, defendant was known to possess an extensive collection of firearms.

[4] Indeed, one of the officers testified that they had never seen or heard of anyone sustaining as much tear gas exposure as did defendant without apparent effect.

defendant as to such events.

Shortly after the dialogue had commenced Sheriff's Deputy Brown handed Chief Burkhardt an audio-tape recorder which he placed just inside the doorway. Chief Burkhardt testified that his sole purpose in recording his conversation with defendant was to preserve defendant's statements as evidence. A transcript of the tape recording of the conversation from the point at which the tape recorder was activated to the conclusion of the conversation, was admitted in evidence.

During the conversation defendant admitted that he'd killed his father and his aunt and set fire to the house. He explained what had occurred on September 17, 1988, and provided a motive for his actions, though he denied having killed Sylvia Bennett and said she had been dead before he set the fire. Defendant also spoke about the disposition of his property - particularly his firearms and automobiles - and the conclusion of his affairs following his demise. At Chief Burkhardt's urging, defendant surrendered two (2) firearms, including a .38 caliber revolver with five (5) rounds of ammunition and a .9 mm handgun with one (1) round of ammunition. He also gave Chief Burkhardt some letters for delivery to various persons. At approximately 3:00 p.m. the officers observed that defendant was not holding a weapon,[5] and Chief Burkhardt entered the room, pulled defendant from the bathroom and threw him to the floor where he was handcuffed. A .9mm handgun was seized from defendant's pocket. Within two (2) minutes defendant was placed in a police vehicle and taken to the Boone County Jail about two (2) miles away.

At 3:10 p.m. defendant was booked at the Boone

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[5] Defendant had told Chief Burkhardt that he had three (3) handguns and two (2) had been surrendered, but the third was not in his hands at this point.

County Public Safety Building on a charge of False Personation of a Peace officer in Illinois. He was not afforded an opportunity to make d telephone call and he was placed in a cell in a cell block which was otherwise unoccupied. At approximately 3:30 p.m. Inv. John O'Donnell arrived at the Ranch Motel where he met with Det. Speidel, Chief Burkhardt and Inv. Bocskay - soon thereafter Inv. Bocskay left the motel and returned to New York- Det. Speidel and Inv. O'Donnell asked Chief Burkhardt if they could speak with defendant. Although defendant was in the custody of the Boone County Sheriff's department and was never charged with the commission of any crime in the City of Belvedere, the New York officers sought and gained access to defendant through the Chief of the Belvedere Police Department rather than the Sheriff's Department.

At approximately 4:40 p.m. Chief Burkhardt, Det. Speidel and Inv. O'Donnell entered defendant's cell at the Boone County Jail. Chief Burkhardt testified that upon entering the cell he asked defendant if he was willing to speak with the New York officers in the interview room. Defendant said he did not want to leave his cell but did not indicate he was unwilling to speak with the officers. Then, as Chief Burkhardt was leaving the cell, he heard Det. Speidel advise defendant of the so-called Miranda warnings. This was the first occasion on which the People allege that the warnings were administered to defendant by anyone. Det. Speidel and Inv. O'Donnell each maintain that almost immediately upon their entry to the cell, defendant spontaneously said that he was "directly involved in" (according to Speidel) "responsible for" (according to O'Donnell) the killings and fire in New York, and that Det. Speidel stopped defendant and administered the Miranda warnings. However, Chief Burkhardt testified that he did not hear defendant make any admission before he heard Det. Speidel administer the warnings.

Following administration of the warnings, defendant agreed to speak with the officers without an attorney present. In response to the officers' general inquiry as to what had occurred an September 17, 1988, defendant essentially gave a narrative account constituting a confession to the homicides of his father and aunt, and the arson at 19 Columbus Circle. Once again defendant related the events of September 17th, provided a motive for the crimes and denied having killed Sylvia Bennett. He also recounted his actions in the days after the crimes.

Det. Speidel and Inv. O'Donnell each described defendant's demeanor during the interview as relaxed, calm, comfortable, cooperative and coherent. No promises of leniency or other inducements were conveyed to defendant, and no deprivation, or physical or Psychological coercion, or the threat thereof, was utilized. Defendant declined their request to tape record his statement, and the People do not allege that they ever asked defendant to reduce it to writing or to sign a written memorandum thereof. At approximately 5:25 p.m. the Boone County State's Attorney and a deputy sheriff entered the cell and asked defendant to execute consents to search his automobile and the motel room. Det. Speidel and Inv. O'Donnell left the cell, with the State's Attorney and deputy, approximately ten (10) minutes after defendant had executed the consent forms[6].

After leaving the cell Inv. O'Donnell placed a telephone call to the Westchester County District Attorney's office and advised A.D.A. Kennedy of defendant's statement and the seizure of the guns. Sometime after 5:30 p.m. a Fugitive From Justice Complaint, concerning the alleged

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[6] If anything was seized from the motel room - other than from defendant's person - or defendant's vehicle, it was not brought up at these hearings or in the papers upon which the hearings were ordered.

arson and homicides, was transmitted from New York and received by the State's Attorney in Boone County, Illinois. Prior to that point no arrest warrant, felony complaint, fugitive from justice complaint or other accusatory instrument had been filed or transmitted in connection with the events of September 17, 1988. Defendant was arraigned on the complaint, in Illinois, on November 14, 1988.

At approximately 10:00 p.m. on November 11, 1988, two (2) officers from the Rockford, Illinois, Police Department arrived at the Boone County Jail to speak to defendant about a number of armed robberies which had occurred in Rockford. The People have served a notice, pursuant to Section 710.30 of the Criminal Procedure Law, of their intent to offer as evidence at trial an oral statement which defendant allegedly made to said officers at approximately 10:45 p.m. on November 11, 1988. The notice indicates that:

> "While being questioned concerning a string of armed robberies, defendant, in substance, reaffirmed his involvement in the New York murders and fire, stating he shot his aunt in the head and battered his father".

However, no testimony or other evidence was offered at the hearings concerning: the circumstances in which the statement was elicited; the identities of the police officers, or other persons, who were present; defendant's condition, or; whether the Miranda warnings were administered.

Gerard Damiani, Esq., an attorney, testified that at approximately 10:00 a.m. on November 12, 1988, he spoke with Nancy Groselfinger at his office in New City, New York. Ms. Groselfinger had retained Mr. Damiani's firm to represent defendant in any criminal proceedings related to the deaths and fire which had occurred in Eastchester on September 17, 1988, At approximately 10:40 a.m. Mr. Damiani placed a telephone call to the Boone County Jail and spoke with Mr. Giesecke, who was then a Boone County

Corrections Officer. Mr. Giesecke confirmed that Mr. Damiani told him that he was representing defendant and that he wanted both defendant and the authorities to be advised of such representation, and that defendant was not to be questioned in his absence.

Mr. Giesecke advised defendant as Mr. Damiani had requested, and he prepared and posted a report in order to apprise the jail staff of this development. Between 11:00 a.m. and 11:30 a.m. that day, Chief Burkhardt entered the jail and asked Mr. Giesecke for the key to defendant's cell. Mr. Giesecke handed Chief Burkhardt the key and a copy of the aforementioned report.[7] At approximately 1:00 p.m. Chief Burkhardt returned to the jail in the company of officers from the Rockford Police Department, and escorted them to defendant's cell. The People have also served a notice, pursuant to CPL 710.30, of their intent to offer as evidence at trial an oral statement which defendant allegedly made to said officers at approximately 1:10 p.m. on November 12, 1988; in which statement defendant allegedly -(made) again about the New York homicides", and "in substance, related the account of the killings set forth in previously noticed statements." Here too, however, no testimony or other evidence was offered at the hearings concerning said statement.

Frank Cushing is a clinical psychologist. He first met defendant on March 9, 1989, at the Boone County Jail for the purpose of evaluating defendant's competence to participate in the criminal proceedings then pending in Illinois. Mr. Cushing conducted subsequent evaluations of defendant for the same purpose on April 15, 1991 and

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[7] The People do not allege that defendant made any statement on this occasion, nor did they proffer any evidence concerning the circumstances of Chief Burkhardt's visit to his cell.

August 5, 1992. On each occasion defendant was deemed incompetent.

He described defendant as a person of "above average to superior intelligence", and opined that defendant was it significantly mentally ill" and had been for some considerable period of time prior to September 17, 1988. Mr. Cushing also testified that, in his opinion on November 11, 1988, in the circumstances then extant at the Ranch Motel and the Boone County Jail, defendant was incapable of making "appropriate, rational, voluntary" judgments as to whether to waive his constitutional rights and answer questions posed by police officers; though defendant was capable of such judgments when Mr. Cushing spoke with him on March 9, 1989. He also reviewed the transcript of the tape recorded conversation between defendant and Chief Burkhardt and testified that, in his opinion, Chief Burkhardt's questions of, and responses to, defendant did not constitute the kind of conversation in which he should have engaged if his purpose was to prevent defendant from committing suicide; i.e., it was not "good technique" in such situations to engage the subject in conversations about the very events which precipitated the crisis.

## CONCLUSIONS OF LAW

One's substantial privacy interests in the physical sanctity of his home, as protected by the Fourth Amendment to the United States Constitution and Article I, Section 12 of the New York State Constitution, are not diminished by the fact that a homicide is alleged to have occurred therein, nor because said person is suspected of having committed the homicide. [Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 (1978); People v. Mitchell, 39 NY2d 173 (1976)] Moreover, a police officer's warrantless entry of even a fire-ravaged hovel is presumptively unreasonable and the burden is upon the prosecution to justify it. [Michigan v. Clifford,

464 U.S. 287, 104 S. Ct., 641 (1984); see also, People v. Calhoun, 90 Misc 2d 88 (S. Ct., Kings Co., 1977) aff'd, 49 NY2d 398 (1980)]. While the entry of the house at 19 Columbus Circle by fire and police personnel on September 17, 1988, for the purposes of quelling the fire, searching for and rescuing occupants, and determining the origin and cause of the conflagration, was clearly justified [Michigan v. Tyler, 436 U.S. 409, 98 S. Ct. 1942 (1978)], the subsequent warrantless re-entries between September 19 and 23, 1988, were, just as clearly, unjustified (Michigan v. Clifford, supra; Michigan v. Tyler, supra).

The critical factor which distinguished the initial entries from the subsequent re-entries was their purpose. By the time Det. Speidel re-entered the house on September 19th the fire had long since been extinguished, the bodies had been removed, the premises had been searched for survivors or other victims, the points of origin and cause of the fire had been determined, and the source of the accelerants - i.e., the gasoline cans - had been removed. Thus, the site posed no immediate possibility of re-ignition or other danger to the general public. In sum, the emergency which had justified the initial warrantless entries by firefighters, medical technicians, police personnel and the Arson Fire Task Force no longer existed. Rather, Det. Speidel reentered the house on September 19 and thereafter to search for and gather evidence of criminal activity - i.e., arson and homicide - a purpose for which consent or a warrant issued upon a showing of probable cause was required. [Michigan v. Clifford, supra; People v. Cohen, 87 AD2d 77 (2nd Dept., 1982)] The People have proffered no evidence that Det. Speidel had either.

Instead, the People argue that these re-entries were effected in continuation of the preliminary investigation which had begun on September 17th. They point to the constant police presence by which the site was secured during an ongoing investigation that allegedly extended from

September 17th to 23rd. Furthermore, the house was allegedly all but uninhabitable, and actually uninhabited, during this period so that Det. Speidel's re-entries, they argue, were only minimally more physically intrusive than the initial entries had been. In support of these contentions the People refer the Court to the Appellate Division's decision in People v. Neulist, 43 AD2d 150 (2nd Dept., 1973). Such reliance is, however, misplaced.

In Neulist - which pre-dated the United States Supreme Court's decision in Mincey v. Arizona, supra - the police officers arrived at and entered a private home in response to the report of a resident that he had found his mother dead in her bedroom. The decedent was found lying in her bed in a pool of blood, so the medical examiner's office was called to the scene. Although a preliminary determination of death due to natural causes was made at the scene, police officers remained behind, to secure the bedroom only, when the body was removed for an autopsy. Within twenty (20) minutes thereafter, detectives were informed that a bullet had been found in the decedent's brain, and less than one (1) hour, in toto, after the body had been removed from the scene the detectives re-entered the house without a warrant and seized various items therefrom.

Subsequently, in People v. Cohen, supra, the Appellate Division resolved the apparent conflict between Neulist and the Supreme Court's holding in Mincey v. Arizona, which had been decided in the interim, on the ground that the re-entry in Neulist constituted a resumption of the preliminary investigation which had begun with the police officer's initial response to the scene. In other words, the preliminary investigation - of a type which was exempted from the warrant requirement in Mincey - had merely been interrupted, not concluded, by removal of the body.

The People's argument to the contrary notwithstanding, however, neither the posting of guards to secure the scene nor the brevity of the time period during

which the investigation was interrupted were dispositive factors in Neulist. Both circumstances were certainly important considerations, but only as evidence that the police detectives' purpose had not changed when the preliminary investigation was resumed. [See, e.g., Michigan v. Tyler, supra at 510-11 (re-entry of fire-damaged premises was, "no more than an actual continuation of the first", entry)]

Regardless of the passage of time or the existence of a continuing police presence, the warrantless entry of a private home as part of the preliminary investigation of a crime committed therein must be strictly limited to a search, "to locate the victim, or discover the perpetrator, or to locate the scene of the crime, or another person who may have been injured". [People v. Rielly, 190 AD2d 695 (2nd Dept., 1993)] Even where it is conducted contemporaneously with an otherwise justified initial entry, a search conducted for the purpose of finding and gathering evidence of criminal activity requires a warrant. [People v. Guins, 165 AD2d 549 (4th Dept., 1991)] The Neulist decision does not, therefore, support the proposition that a search conducted for such purpose is justified under the so called "emergency exception" to the warrant requirement, merely because it was accomplished within a short time after the occurrence of the emergency while the scene was continuously secured by the police.[8] [See People v. Cohen, supra]

Nor can the warrantless seizure of property from defendant's home on and after September 19, 1988, be justified, as the People contend, an the ground that he had abandoned the house and its contents. A house is not a piece of personal property whereby one's interest in it can be "abandoned" by discarding [compare, People v. Eldridge,

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[8] Indeed, the fact that the police have secured the scene is a circumstance which makes the need for a warrant more, not less, compelling. (See Mincey v. Arizona, supra)

178 AD2d 609 (2nd Dept., 1991)], or walking away from it [compare, People v. Covington, 199 AD2d 528 (2nd Dept., 1993)]. In order for there to be an abandonment justifying the warrantless seizure of property the circumstances must establish the defendant's intent to purposefully divest himself of possession. [People v. Anderson, 24 NY2d 12 (1969)] The mere fact that a person leaves his home and does not return to it for six (6) days[9] hardly evinces an intent to purposefully divest himself of possession of the house or its contents. Thus, the prosecution has failed to satisfy its burden to establish that defendant's absence constituted an abandonment so that any reasonable expectation of privacy he may have had in his home or the contents thereof was forfeited. [Compare, United States v. LeVasseur, supra (defendants had a prior history of fleeing from, and not returning to, houses; defendants were aware that FBI had surrounded house and arrested their colleagues in their absence, and; defendants had, in fact, leased an apartment and established a home in another state)]

Consequently, defendant's motion to suppress the People's introduction as evidence at trial of work gloves, a hammer, a baseball bat and a plastic bag containing a white jacket, a shoe and a set of dentures, which were allegedly seized without a warrant from the premises at 19 Columbus

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[9] Although defendant had actually been absent for only two (2) days when the first unjustified entry was made on September 19, 1988, it is arguable that the circumstances relevant to the disposition of this issue can include subsequently discovered events which were not known to the police at the time of the seizure. [See United States v. LeVasseur, 816 F2d 37, (2nd Cir., 1987)] However, no evidence was proffered at these hearings that defendant had not actually returned to 19 Columbus Circle between September 23 and November 10, 1988, that he had not taken steps to protect the premises in his absence or, indeed, that he had, to this day, done anything which would indicate that said premises were no longer his home after September 17, 1988.

Circle on and after September 19, 1988, is granted. Defendant's motion to suppress three (3) gasoline cans and broken dentures which were allegedly seized from said premises on September 17, 1988, is denied. (Michigan v. Tyler, supra)

Defendant moves to suppress the various statements which he allegedly made at the Ranch Motel and the Boone County, Illinois, Jail on a vast myriad of grounds. While the Court has given due consideration to each of the grounds raised, and the People's opposition thereto, however, defendant's applications are determined on the following limited bases.

Prefatorily, both parties contend, and the Court agrees, that the determination of defendant's motions must be governed, to the extent there is conflict with the law of the State of Illinois, by New York law. [See People v. Ostas, 179 AD2d 893 (3rd Dept., 1992); People v. Tayeh, 96 AD2d 1045 (2nd Dept., 1983)] Under the law of this State a defendant is "in custody" - for the purpose of determining when the protections mandated by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966) apply - when he is aware that he is under formal arrest [see People v. Arminio, 104 AD2d 995 (2nd Dept., 1984)], or when his freedom of movement is restricted by a police presence to such an extent that it rises to the level of a de facto arrest [see People v. Ripic, 182 AD2d 226 (3rd Dept., 1992)]. In either scenario, of course, the ultimate standard is whether a reasonable innocent person in like circumstances would have believed that he was free to leave (People v. Yukl, 25 NY2d 585 (1969)] and, pursuant to either analysis, the defendant herein was clearly "in custody" before he made any statements at the Ranch Motel on November 11, 1988.

Indeed, the entire episode commenced with an announcement over a loudspeaker in which defendant was addressed by name and advised that he was "under arrest". During the next two (2) hours tear gas was fired into

defendant's room, the door was kicked in by gun-wielding police officers, more tear gas was fired into the room, the water and ventilation were shut off and an attempt was made to force open the bathroom door behind which defendant had retreated; and all before there was any further communication of any kind from the police or the defendant. Such circumstances constitute presumptive evidence that defendant was "in custody"[10] when Chief Burkhardt engaged him in conversation. [See People v. Shivers, 21 NY2d 118 (1967)); People v. Mateo, 122 AD2d 229 (2nd Dept., 1986) (righteousness of arrest is irrelevant); compare, People v. Flannery, 137 AD2d 615 (2nd Dept., 1988) (person holding hostage behind a closed door who is not advised by single, unseen, negotiating officer of arrest or armed police presence is not "in custody"), also, People v. Manzella, 199 AD2d 964 (4th Dept., 1993) (defendant not in custody while barricaded in his own house, citing Flannery)]

"However, both the elements of police

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[10] The People's citation of People v. Ripic, supra, in support of their argument to the contrary is unavailing. In Ripic the defendant, who was deaf, was interviewed in her hospital room by two plainclothes police officers concerning the shooting of her husband. The officers were described as, "patient, comforting and considerate and not threatening" (182 AD2d at 231), by the two civilian interpreters who were present, and the hospital staff who treated defendant, throughout the interview. Nor had the defendant objected to the officers' presence or their questions. Thus the "circumstances and atmosphere" in which said questioning occurred -and which the Ripic court found dispositive - can hardly be compared to the "circumstances and atmosphere" in which the defendant herein was questioned. Moreover, the Ripic court held that the defendant herein was in custody from the point when she gave her first inculpatory reply. (182 AD2d at 235-36) Consequently, all of Mr. Macaro's statements following his initial reply to Chief Burkhardt's first questions would be suppressed under Ripic in any event.

> 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by Miranda."

[People v. Huffman, 41 NY2d 29, 33 (1976) (emphasis added)]

Thus, the Court must next determine whether any of the statements which defendant made while in police custody at the Ranch Motel were the product of police "interrogation".

> "[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

[Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682 (1980)]

Furthermore, it is irrelevant whether the response elicited was actually inculpatory, neutral or exculpatory. (Miranda v. Arizona, 384 U.S. at 476-77) For example, defendant's alleged shouts of, "Get back. Get back", as the police tried to force open the bathroom door and, "It'll all be over soon", in response to Chief Burkhardt's entreaty that he should come out, are not subject to suppression for the failure to administer the Miranda warnings because the police action by which they were, arguably, prompted was not reasonably likely to elicit an incriminating response - not because they did not appear to be inculpatory when made. However, considering his words and actions in the totality of the circumstances in which they were undertaken, a "police

interrogation" commenced immediately thereafter when Chief Burkhardt initiated a conversation by inquiring as to defendant's reasons for being in Illinois.

In other circumstances such a question might have constituted a non-interrogative, "investigative inquiry" (see, e.g., People v. Huffman, supra), or innocuous query designed to diffuse a potentially volatile situation (see, e.g., People v. Flannery, supra). In these circumstances, however, it was neither. Chief Burkhardt already knew full well why defendant was, and much of what he had been doing, in Illinois, as well as how long he had been at the motel, where he had come from, and when and what events had precipitated his departure from New York. Clearly, this question, and those that followed, were designed to elicit from defendant incriminating statements about the New York fire and deaths. [See People v. Johnson, 64 AD2d 907 (2nd Dept., 1978), aff'd., 48 NY2d 674 (1979) (questions during vehicular stop as to ownership, and driver's possession, of car were "interrogation" where police knew, prior to stop, that car had been stolen, and theft concluded, some distance from scene of stop); see also, People v. Shivers, supra; c.f., People v. Huffman, supra] Indeed, Chief Burkhardt candidly testified that he knew that his words and actions were reasonably likely to elicit incriminating responses and that such was the very purpose and intent of his conversation with defendant. If, as the People argue, he also harbored the altruistic purpose of preventing defendant from taking his own life, Chief Burkhardt's actions were aggressively and purposefully counterproductive of said goal. He consistently attempted to focus the conversation on the fire which destroyed defendant's home and the deaths of defendant's father and aunts in New York - i.e., the very events which had triggered the crisis which led to defendant's threatened suicide - despite that he was ostensibly there to execute a warrant of arrest for a class B misdemeanor which had allegedly occurred in Illinois. Indeed, on at least two (2)

occasions which are memorialized in the transcript, Chief Burkhardt ignored defendant's specific request not to discuss the New York events and eventually redirected the conversation back to the fire and deaths. This was not, then, a situation where the police officer's efforts were designed and intended to persuade an excited, barricaded suspect not to injure himself [compare, State v. Reinmann, 19 Kan. App. 2d 431, 870 P2d 1346 (1994) (negotiating officer did not know that crime had been committed during open-ended conversation designed to make subject feel safe and unthreatened), also, Romine v. State, 455 N.E.2d 911 (S. Ct. of Ind., 1983) (conversation designed to convince suspect to surrender knife which he held to his own chest)], or to release a hostage [compare, United States v. Mesa, 638 F2d 582 (3rd Cir., 1980) (FBI hostage negotiator was principally a passive listener and did not attempt to control direction of conversation) also, State v. Pelsa, 75 Wash. App. 139, 876 P2d 963 (1994) (citing and following Mesa)].

Nor can the interrogation be condoned under the so-called "public safety" exception to the Miranda rule [see New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984)], merely because Chief Burkhardt also asked defendant to surrender his weapons during the conversation. The motel had been evacuated of all non-police personnel save defendant, and the area was surrounded and secured by police officers before they even announced their presence to defendant. Thus, no "public safety" emergency existed by the time Chief Burkhardt posed his first question about a weapon. [See People v. Strickland, 169 AD2d 9, 13-14 (3rd Dept., 1991)] Indeed, according to Det. Speidel, defendant's presence in the motel had been confirmed by 7:00 p.m. on November 10, 1988. Yet, despite that the police also knew of defendant's extensive collection of firearms and that he had taken at least several of them into the State of Illinois with him, no effort was made to apprehend defendant, secure the area around the motel, or to warn or evacuate other

occupants of the motel for more than seventeen (17) hours. Apparently, therefore, the police had perceived no threat to "public safety" from defendant prior to announcing their presence either.

Moreover - while the Court finds unpersuasive defendant's arguments that his right to counsel was violated by the prosecution's purposeful delay in filing an accusatory instrument concerning the New York crimes, and their utilization of the Illinois charge as a mere pretext [11] - the conduct of law enforcement authorities throughout the period from November 7, 1988, until defendant's apprehension at approximately 3.00 p.m. on November 11th, was highly indicative of both an intent and a concerted effort to elicit from him an incriminating statement. Indeed, the record of these proceedings virtually shouts - from the testimony of Charles Madison concerning what he did not tell the police, to the testimony of Det. Speidel concerning what the police did not do upon locating defendant at the Ranch Motel, to the testimony of Chief Burkhardt concerning the purpose of his conversation with defendant (i.e., to "wrap up loose ends" and "resolve unanswered questions about the New York events") and in recording that conversation (i.e., to preserve defendant's statements as evidence) - that, from the beginning, the prosecution was more concerned with acquiring a self-incriminating statement than they were with "public safety"; even to the extent that they were apparently prepared, if necessary. to sacrifice the latter for the former.

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[11] Clearly, the New York authorities had probable cause to believe that defendant had committed arson and homicides as early as September 17, 1988, but there is no right to be arrested and a purposeful delay in effecting an arrest to circumvent a suspect's right to counsel is not improper. [See People v.Counts, - AD2d -, 625 N.Y.S. 2d 697 (3rd Dept., 1995)] Thus, even if the arrest warrant for the Illinois crime was a pretext, it was irrelevant for purposes of our analysis herein.

Consequently, it is quite evident that the questioning of defendant at the Ranch Motel was, "based upon a need to solve the crime[s] and not upon any objective need to protect the public". [Matter of John C., 130 AD2d 246, 254 (2nd Dept., 1987); c.f., People v. Treier, __ Misc 2d __, 630 N.Y.S. 2d 224, 227-28 (Monroe Co. Ct., 1995)]

Since the statement at the motel was the product of custodial interrogation, and was elicited from defendant without having first advised him - and obtaining his knowing, intelligent voluntary waiver - of his constitutional rights to silence and counsel, its use at trial as direct evidence of defendant's guilt must be precluded. [Miranda v. Arizona, supra; People v. Bethea, 67 NY2d 364 (1986)]

Furthermore, the statement which Det. Speidel and Inv. O'Donnell elicited from defendant in his cell at the Boone County Jail following his arrest was the end product of a single, continuous chain of events which began when defendant was "in custody" at the Ranch Motel more than four (4) hours earlier. During this period defendant was continuously "in custody", and the equivalent of a complete confession to the crimes of arson and murder had been unlawfully elicited from him while, according to the police, he was, emotionally, suicidal and, physically, exposed to the effects of more tear gas than any subject had ever sustained in the experience of the officers present. Moreover, extrapolating from the opinion of the only expert to take the stand, the nature of the questions put to defendant during the interrogation had probably exacerbated his already unstable mental and emotional states and rendered him incapable - if he was not already - of making an appropriate, rational, voluntary", judgment to waive his constitutional rights to silence and counsel.

In such circumstances the passage of a mere one and one-half (1½) hours from the point at which he was booked at the jail - during which time defendant was held incommunicado in an isolated cell - did not constitute, "such

a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning". (People v. Chapple, 38 NY2d 112, 1115 (1975); see also, People v. Ripic, supra at 236] Consequently, the administration to defendant of the so-called Miranda warnings for the first time in the presence of three (3) law enforcement agents in his cell, was insufficient to purge the taint and protect his rights, [See, People v. Bethea, supra; People v. Johnson, supra]

Given the extraordinary and questionable measures undertaken by the New York law enforcement authorities in furtherance of their efforts to elicit incriminating statements from defendant, as well as the fact that Chief Burkhardt's testimony of the event was directly opposite to the testimony of Det. Speidel and Inv. O'Donnell, the Court finds that defendant did not spontaneously confess his complicity in the New York killings and fire before the warnings were administered. In any event, since the chain of custodial interrogation had not, at that point, ceased the People have failed to satisfy their burden. of proof to show that this statement was not the product of an interrogation environment. [People v. Stoesser, 53 NY2d 648 (1981)]

Nor have the People even attempted to satisfy their burden to prove that the statements elicited at the Boone County Jail on November 11 and 12, 1988, by officers of the Rockford Police department, were voluntarily made following a knowing, intelligent and voluntary waiver of defendant's constitutional rights to silence and counsel. [People v. Huntley, 15 NY2d 72 (1965); People v. Rivera, 66 AD2d 714 (1st Dept., 1978)] Perhaps this nonfeasance is a consequence of the fact that the fugitive from Justice Complaint charging defendant with the New York crimes had been filed and transmitted Illinois before the first of these interviews, and an attorney had specifically prohibited any questioning of defendant before the second. Defendant's

right to counsel had, indisputably, attached or been invoked, and violated, in each instance.

Accordingly, for all of the foregoing reasons, defendant's motions to suppress statements which he allegedly made at the Ranch Motel on November 11, 1988, and at the Boone County Jail on November 11 and 12, 1988, must be, and are hereby granted to the extent that the People are precluded from offering on their direct case at trial any evidence thereof. However, since the Court finds that the statements made on November 11, 1988, at the Ranch Motel and to Det. Speidel and Inv. O'Donnell at the Boone County Jail, were not the product of coercion, they may be used for the purposes of impeachment of defendant, should he elect to testify, and appropriate rebuttal. [Harris v. New York, 401 U.S. 222, 91 S. Ct. 643 (1971); People v. Maerling, 64 NY2d 134 (1984)] Finally, since the Court finds that the seizures of personal property from defendant at the Ranch Motel were accomplished incident to a lawful arrest, and were not the product of coercion or a violation of defendant's rights under the Fourth Amendment to the United States Constitution or Article 1, Section 12 of the New York State Constitution, his motions to suppress the .38 caliber revolver, five (5) rounds of .38 caliber ammunition, one (1) round of .9mm ammunition[12] and letters, are denied.

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
October 25, 1995

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[12] Although Chief Burkhardt testified that two (2) .9mm handguns were also seized, the scope of the hearing on defendant's suppression motion was limited to the enumerated items by stipulation of the parties.

PETER M. LEAVITT
County Court Judge

New York Times - Saturday, November 25, 1995
THE METRO SECTION

Photograph of Ray J. Macaro, Jr.
at his trial for murder in White Plains, N.Y.

MURDER SUSPECT ACCUSED OF FAKING ILLNESS FOR YEARS, DOCTORS SAID SCHIZOPHRENIA BARRED A MAN'S TRIAL.
by Debra West
White Plains, Nov.22 - For almost seven years Ray J. Macaro., Jr. it was the picture of a man unfit to stand trial: a paranoid loner who fantasized that even his own lawyer was conspiring against him.

It seemed unlikely that Mr. Macaro would ever be tried in the deaths of his father and two elderly aunts in Eastchester. Indeed, although he was arrested on November 11, 1988, Mr. Macaro was confined to psychiatric hospitals until recently, with doctors in two states repeatedly declaring him mentally ill.

But all that changed this year after a psychiatrist told authorities that he overheard Mr. Macaro, a former probation officer, counselling other patients on how to avoid prosecution by feigning insanity.

Mr Macaro is now on trial in Westchester County Court on charges that he beat to death his father, Raphael Macaro, Sr., 80, and his aunt, Sylvia Bennett, 86, shot and killed another aunt, Regina Deline, 73, and then set the family home on fire.

Mr. Macaro is mounting an insanity defense, which prosecutors dismiss as part of his years long masquerade to elude prosecution. They assert that Mr. Macaro is more cunning than insane, having killed his relatives during a

simmering feud over the deed to the Macaro's house.

And in New York and Illinois, where Mr. Macaro fled after the slayings and was institutionalized until 1992, prosecutors say that they long suspected that he heeded the advice he was caught giving to others: He did not cooperate or portrayed himself as ill with doctors and lawyers, even refusing medication when evaluations of his competency were at stake.

"He was playing the system, than's what it seemed to us" said David D. Koski, a state attorney in Illinois who tried to prosecute Mr. Macaro on armed robbery charges. When Thurgood Marshall retired from the United States Supreme Court, Mr. Macaro discussed it with other patients; Koski recalled "He was making very sophisticated assessments. We never thought he was unable to cooperate with his lawyers. we thought he was unwilling,"

A finding of competency in Illinois, as in New York requires that a person understand the nature of the charges against him and can assist in his defense. Once declared unfit to stand trial, a person is committed to
a mental institution for treatment until competency is restored That takes, on average six months, said Richard P. Miraglia, assistant director for forensic services with the Office of Mental Health, in Albany in New York in 1993, the most recent year with available data, 390 people were declared incompetent to stand trial.

"Competency is a fluid thing." Mr. Miraglia said. "It changes, particularly if a person is being treated with psychotropic medicines and then stops taking them."

Under the law, being declared incompetent is far different from being declared not guilty by reason of insanity. A finding of insanity requires that a jury conclude that a suspect was incapable of knowing and understanding the nature and consequences of his or her actions at the time of a crime.

In his opening statement at the murder trial in

Westchester County, Assistant District Attorney George L. Bolen described Mr. Macaro to the jury: "He was a probation officer. He knew the criminal justice system inside and out. Actions speak louder than words. In this particular case, his course of action speaks tons about his mental state and what he was intending to do."

Mr. Macaro's lawyer, Joel M. Aurnou, however, without acknowledging that Mr. Macaro killed his relatives. related the emotional effect that growing up with violent and alcoholic parents had on Mr. Macaro, who was 44 and living at home at the time of the slayings.

"Without any experts or professionals, you would still know that Ray Macaro was extremely emotionally disturbed. " Mr. Aurnou said, gesturing toward his six-foot tall, broad-backed client, who sits through the trial staring straight ahead for hours without seeming to move.

Mr. Aurnou told the jury, how the elder Mr. Macaro, who had been the Eastchester Town Attorney" secretly signed over the family's home to two of his siblings in an elaborate plot to defraud his wife, Ruth, and to steal his son's inheritance.

"Ray didn't have a coherent plan of "action," Mr. Aurnou said. "He was absolutely distraught at that time. You will find out now totally disorganized he was and how sick. There is a great deal more to this case than how he felt about the house."

According to Mr. Macaro's five confessions, which a judge ruled were taken illegally and cannot be used in court, Mr. Macaro's mother, Ruth, was in the hospital on Sept. 16. 1988, when he got in a fight with his father and threw him down the basement stairs. Sometime later, when his father's Sister, Mrs. Deine found the body, Mr. Macaro said, he shot her twice in the head.

Mr. Macaro denied killing denied mother's sister, Mrs. Bennett, who was bedridden and weighed only 75 pounds at the time. He said she was already dead when he

set the fire "to end all the troubles caused by the house."

In the weeks that followed, authorities say, Mr. Macaro drove west and committed five armed robberies in Illinois.

He was arrested during a suicidal standoff at a Belvedere, Ill. motel, and for the first time, soon declared incompetent to stand trial.

To the frustration of prosecutors in Illinois, Mr. Macaro remained in state psychiatric hospitals from July 1989 to October 1992. He was diagnosed with a form of schizophrenia, but local prosecutors always suspected he was faking.

In November 1992, the Illinois court found him fit to stand trial.

Rather than face armed robbery charges, Mr. Macaro waived extradition and returned to New York.

Back in Westchester, two court appointed psychiatrists declared Mr. Macaro a paranoid schizophrenic and again found him unfit to stand trial. For two years, the Westchester County District Attorney's office did not challenge the doctors' findings.

But by June 1994, Dr. Manouchehr Lavian, a psychiatrist at Mid-Hudson Psychiatric Center where Mr. Macaro was being treated, indicated that he had uncovered Mr. Macaro's ruse.

"Patient at times can be heard telling other patients about their legal situations possibly, offering advice but when it comes to his own case, he clams up and will not discuss his charges though he does have full understanding of the court system." Dr. Lavian wrote in a treatment plan review of Mr. Macaro that was dated April 30. 1994.

The advice Mr. Macaro was dispensing, Dr. Lavian said at a pretrial hearing, included how to use insanity to avoid prosecution. He would tell others, for example, that they could refuse to cooperate with doctors or lawyers, Dr. Lavian said. It was Mr. Macaro's own lack of cooperation -

not following doctors, orders for treatment, not taking medication, arguing with his lawyer - that led to his being found incompetent, Lavian and prosecutors noted.

So in January, Justice James R. Cowhey of State Supreme Court found Mr. Macaro competent and he was moved to the Westchester County jail. His trial is expected to continue through mid-December.

It is not unusual for someone once judged unfit to later be prosecuted and found guilty, said Henry J. Steadman. a sociologist who wrote "Beating a Rap? Defendants Found Incompetent To Stand Trial in New York." which was published in 1979. Indeed, Ricardo S. Caputo, who in 1971 was found incompetent to stand trial for murder, only to escape from a mental hospital in Westchester and kill three more people, turned himself in to authorities last year. He was ruled competent to stand trial, and has so far pleaded guilty to two of the killings.

"'You almost always go back to court." Dr. Steadman said. "District attorneys are not interested in having people disappear into the mental health system."

Using data that Dr. Steadman compiled for his book, he found that 92 percent of people charged with felonies and found incompetent, ultimately were returned to court to face the charges. Of those, 75 percent were found guilty

**Burkhart - for People - Direct**

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MR. BOLEN: November 11, 1988.

Q Did I inquire of you whether you had been working that particular day or otherwise?

MR. AURNOU: Objection, your Honor. don't understand the question. Is he asking whether he --

MR. BOLEN: I withdraw the question.

THE COURT: Sustained as to form. Ask it again.

Q Going back in time, were you scheduled to work a specific tour of duty on November 11, 1988?
A No, sir.
Q And why was that?
A It was a holiday.
Q And what holiday was that?
A Veteran's Day.
Q I asked you several questions before about courts, police departments, state's attorneys. How long have you been with the Belvidere Police Department before November 11, 1988?
A Approximately eleven years.
Q And to your knowledge how many judges would there have been who had county-wide jurisdiction? 35 Belvidere?
35
A No.
Q Now I wonder if you can now relate to the Court, to the best you can, and at any point if your recollection needs to be refreshed let me know, what happened from the point you got that call, what basically did you do?
A I reported to the Public Safety building, spoke with Chief Wirth. I directed my supervisor on day shift to call in a couple of officers to provide assistance in the arrest warrant service.
MR. AURNOU: Your Honor, would you be kind enough to ask the witness to keep his voice up?
THE COURT: If you don't mind.
A (Continuing) I met with Sheriff Wirth, representatives of the Loves Park Police Department, primarily Chief Lindberg and Lt. Dan Johnson, also other officers from the Boone County Sheriff's office, Lt. Purvis, ]Deputy Gay, a couple others I don't recall at that point in time. We met at the Public Safety building. I also believe there were representatives from New York jurisdiction at the Public Safety building at that time as well.
Q Do you recall the name or names of those people who may have been there?

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A I believe Detective Speidel and Detective Bocsky.
Q And basically what, if anything, transpired at that meeting?
A At that point in time we were advised that a gentleman by the name of Raymond Macaro had been identified in the jurisdiction of Loves Park attempting to purchase items from the Madison Gun Shop utilizing identification, that of a police officer, and at the same time Detective Bocsky and Speidel advised us that they were in our jurisdiction in reference to speaking to Mr. Macaro with regard to a murder investigation they were working back here in New York.
Q Let me interrupt you at that point. At that point in time do you recall whether or not either Speidel or Bocsky at any point indicated to you they had any kind of specific court papers, specifically an arrest warrant, with respect to the matter they were then in your jurisdiction investigating?
MR. AURNOU: Your Honor, I object.
THE COURT: Overruled. I am going to allow it.
MR. AURNOU: I'm sorry?

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THE COURT: I will allow it for the purpose of the hearing. I will allow the question. Go ahead.
A I was advised that they were there on an investigation and they had no documents at that point in time.
Q Please continue, and specifically, if you can, elaborate with respect to the events of Loves Park, if you can?
A At that point in time we were advised by Chief Lindberg that Lt. Johnson was in the process of securing a complaint and arrest warrant from Judge Riggs (ph) in Winnebago County for the offense in question, impersonating a police officer, and approximately 11:50 A.M. on the 11th Lt. Johnson arrived at Belvidere/Boone County Public Safety building with a complaint and a warrant signed by Judge Riggs of the 17th Judicial Circuit.

Q What, if anything, then transpired?
A At that point in time we left the Public Safety building, we went out to the Ranch Motel where at that point in time we believed Mr. Macaro was residing in hotel room 14. We secured the building prior to execution of the search warrant.

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Q Execution of what?
A Excuse me. Execution of the arrest warrant. We spoke to a couple of residents who were residing in the motel requesting them to leave the premises during the period of time we needed to execute the arrest warrant and shortly thereafter we went to motel room in question, #14, and the County Deputy at that time, Tim Brown, with the use of a loudspeaker requested that Mr. Macaro exit his hotel room.
Q Let me ask you a few questions about the Ranch Motel, specifically where was that located and can you describe that complex to us, how many rooms and the configuration?
A The Ranch Motel is located on Business 20, I should say was located on Business 20 just to the west of Belvidere, approximately one mile outside the city limits. It is a wood frame construction. And at that point in time I believe it had 20, 25 rooms to the motel complex.
Q Were you familiar with that motel before that day'?
A Yes, I had been there before.
Q Were you familiar with the proprietors?
A Yes.

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Q And their names were, if you recall?
A I don't recall.
Q To your knowledge before that day, and as of that day, did were any of the individual rooms equipped with a telephone?
A No, they were not.

Q Can you please continue, I think I perhaps interrupted you at that point when I believe you said Officer Brown used a bullhorn or something to communicate with Mr. Macaro; is that correct?

A Yes. The room was totally shut up, the curtains were drawn, no telephone. We attempted to use the bullhorn to notify the individual in the room to exit the room. This was about 12:30 P.M. on the 11th. No response was made, no one came to the door, no one exited the room. At that point in time, at the direction of Sheriff Wirth, we introduced tear gas into the room by use of a shotgun commonly referred to as what is a ferret round, it penetrates doors and expels gas into the room.

Q How many departments were deployed outside withdraw that.

How many personnel from how many departments approximately were deployed outside?

A I am guessing, immediately outside there were



probably ten officers representing Belvedere Police Department, Boone County Police Department, Loves Park Police Department. Then, of course, the detectives from New York were also on the perimeter.

Q In terms of this operation, if you can use that, who was in charge?

A Sheriff Duanne Wirth.

Q To your knowledge what, if any, input did either of the members of the New York Police Department or the District Attorney's office have in connection with that tactical deployment?

A None.

Q What, if anything, then transpired after the ferret rounds were induced into the room in question?

A We waited for a period of time to see if the ferret rounds and the tear gas induced would have any effect. After a period of time we came to the conclusion there

possibly wasn't anybody in the room. At which point in time Sheriff Wirth directed us to enter the room to see if in fact there was anybody in the room.

Q And who, if anyone, was designated or volunteered to perform the particular chore?

A At that time Lt. Purvis from the County Sheriff's Department, Deputy Brown, officer Coduto from

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the Belvedere Police Department and myself went to the doorway and with the aid of Lt. Purvis using a passkey we retrieved from the owners of the motel, he opened the door, found the door was still secured with the use of a chain on the door, at which time Lt. Purvis kicked the door in.

Q With what result, if any?

A The door opened at that point in time. Lt. Purvis advised the officers on the outside that he observed Mr. Macaro in the room.

MR. AURNOU: Excuse me, your Honor.

(Whereupon, brief pause in the proceedings.)

MR. AURNOU: Thank you, your Honor. May I have that read back?

(Whereupon, previous question and answer read by court reporter.)

Q Please continue.

A (Continuing) And that Mr. Macaro was armed with a sidearm.

MR. AURNOU: With what, sir?

THE WITNESS: A sidearm, a weapon.

Q Officer, I am going to ask you to do me a favor. The acoustics in this room is not well.

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MR. AURNOU: And my hearing is worse.

Q So if you can, try to keep your voice up. Also the air is not that good in here either. What, if anything, then took place?

A At that point in time Mr. Macaro left the living

quarters of the motel room and went back to a bathroom located in the back of the motel room and we stayed on the outside of the motel room at that point in time.

Q Now, at that particular point in time what, if any, information did you have as to where either Speidel or Bocsky might have been?

A To my knowledge they were what I referred to as the perimeter, they were not anywhere close to me.

Q Now up until that point in time withdrawn. From the point in time that the door was open after the passkey was utilized, and I take it the door was somehow, additionally there was something preventing the door from opening after the passkey was used?

A After the passkey was used there was a chain on the door that prevented the door from opening totally and Lt. Purvis kicked the door to break the chain.

Q From that point on, until you indicated the occupant, Mr. Macaro, went to a bathroom, did you hear him say anything?



A At that point in time, no.

Q Then what, if anything, occurred?

A We attempted to initiate conversation with Macaro,however, there was none at that point in time so based on, once again directive of Chief Wirth, we induced more tear gas into the motel room and bathroom area.

Q Now up until this particular point in time do you recall whether or not with respect to each of the rooms in the motel, particularly Room 14, the common utilities were still in effect, to wit, water, electricity, things like that?

A That's correct.

Q Please continue. Did there come a point in time when at someone's directive

MR. AURNOU: Your Honor

MR. BOLEN: Withdraw that.

THE COURT: Withdrawn. Go ahead.

Q Please continue, what, if anything, happened then?
A The tear gas we induced into the room itself had no effect. We were concerned about tear gas drift, as well as him, Mr. Macaro, utilizing water in the bathroom to possibly eliminate the effects of the tear gas. So we turned off all the air conditioning as well as the water

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into the motel complex.
Q Please continue. What, if anything, then occurred?
A At that point in time once again the tear gas had no effect, Mr. Macaro was not coming out as we had requested that he do so Sheriff Wirth directed us to reenter the motel room and attempt to force the door on the bathroom in an attempt to get Mr. Macaro out of the motel room, at which time we attempted to do that.
Q Did Sheriff Wirth offer to lead the charge?
A No, he did not.
Q How was it determined that you, of all the people there, were part of that detail?
A I was part of the detail because I had the most tactical experience on both the Sheriff's and the Police Department at that time.
Q Please continue. What, if anything, then happened after Sheriff Wirth issued that additional directive?
A Well, the same four officers entered the motel room, Coduto, myself, Deputy Brown and Lt. Purvis. We covered the bathroom door area while Lt. Purvis went up to the door area, attempted to push on the door, attempted to open the bathroom door. He met resistance,

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at which time Mr. Macaro, from the bathroom, yelled, "Get back, get back," and we exited the motel room and took our positions up directly outside of the motel room.
Q I asked you this question before, but let me repeat it. At that point what, if any, knowledge did you have as to where either Officer Speidel or Bocsky were?

A To my knowledge they were still on the perimeter out of my sight.
Q And where exactly did you position yourself at that point?
A I located myself directly outside of the motel room doorway and just to the north of that doorway.
Q And about how far from you would the entranceway to the bathroom have been?
A The entranceway to the bathroom would have been some fifteen feet, I would suspect.
Q And you made mention of two or three other officers. Where would they have been in relation to you with respect to the position you had then taken up?
A Deputy Brown located himself directly behind me. officer Coduto and Lt. Purvis took up positions outside of the doorway, but to the front of the doorway, just to the south of the doorway was a large window and there was no place to safely secure yourself.

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At that point what, if any, indication did you have as to whether or not there was just one or more than one occupant in the room and, more particularly, within the bathroom?
A At that point in time the only occupant we saw and believed to be in the room was Mr. Macaro.
Q Now what, if anything, then occurred from that point on?
A At that point in time I was yelling rather loudly requesting Mr. Macaro to exit the bathroom, to exit the motel room, leave any weapons he may have had behind, raise his hands and walk out, at which time Mr. Macaro replied to me that he was not coming out, that it would all be over soon and we could come in and get him after that.
Q He said, "It would all he over soon," is that correct?
A That's correct.
Q When you heard that what, if anything, was your understanding of those words?

A I took it to mean that either Mr. Macaro was going to take his own life or he was going to force one of us to do it for him.

Q Were you armed at that point?

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A Yes, I was.

Q And where was your weapon?

A It was in my right hand.

Q were other officers armed as well?

A Yes, they were.

Q Please continue, what, if anything, then transpired by way of conversation between you and/or Mr. Macaro?

A Mr. Macaro continued to state that after it was all over there were certain things he requested that I do for him. One of them was to cremate his body, have his remains shipped to a cousin of his by the name of Richard Sherry or Cleary, I believe. He also stated that he had numerous weapons that he possessed that were at various locations in both Illinois and New York and he would like those weapons sold, any proceeds to be delivered to his mother who was here in New York. Conversation continued. I asked Mr. Macaro why is it that he couldn't come out, turn himself in and go back to New York. He indicated there was nothing left in New York for him, that his mother was old and ill and there was no reason to return to New York. I continued to ask him what happened in New York that caused him to he in Illinois and he advised me that he had killed his father and his

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aunt and that he had subsequently after their death burned down the house in which they were in at the time.

Q From his initial response about it would be soon be over, words to that effect, your understanding of what you thought that meant, what was your purpose in the ensuing conversations then had between you and Mr. Macaro?

A The purpose was to clear up any business he may

have had. I believed he would either kill himself or force us to do it for him.

Q What was your purpose thereafter in posing the questions you did or engaging in the conversation you did with respect to Mr. Macaro?

A To clarify any unopened questions. I knew the detectives from New York were there inquiring into Mr. Macaro's involvement, if any, in the deaths of his father and his aunt as well as the cases pending in Illinois. It was just to tie up loose ends if in fact he did kill himself.

Q What, if any, attempts did you make by way of the situation to perhaps forestall any possible taking of life whether it be his or anyone else's?

MR. AURNOU: Judge, again counsel is leading.

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A Absolutely.

Q You had some experience dealing with that situation before that day?

A Yes.

Q Now please continue. Then what, if anything, then occurred by way of anything being said by you or Mr. Macaro?

A I asked Mr. Macaro what transpired in New York, what forced him to come to Illinois. He advised me that his father and his aunt had been systematically or continuously stealing money from his mother and that he and his father got into an argument over it and that he killed his father by beating him. Mr. Macaro advised me that his father fell down the stairs as a result of their confrontation and the beating that Mr. Macaro had inflicted upon his father. Mr. Macaro stated that he went to the basement area where his father had ended up after falling down the stairs and checked on his father and advised me that he found his father to be dead and at about that time another aunt, one of his aunts, walked into the basement area, saw what was taking place. Another argument or confrontation ensued and he said he

shot his aunt.

I, at that time, asked Mr. Macaro, it is my

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understanding that there was another aunt, what happened to her. Mr. Macaro advised me that he did not kill the second aunt, that she was already dead at the time and that he at that point in time set the house on fire and had left the area. Mr. Macaro advised me that he then drove through several states and eventually ended up at the Ranch Motel in Belvedere/Boone County, Illinois.

Q While these things were being said to you and in your presence do you recall where at that point the other officers were who you initially described as being with you?

A once again Deputy Brown was located directly behind me along the north wall of the motel, Lt. Purvis was located probably eight feet outside the doorway.as well as Officer Coduto.

Q At or about this time do you recall whether anything occurred, such that you or your attention was drawn to something; do you understand that question? I tried to phrase it as non-leading as possible.

A Well, shortly thereafter Deputy Brown came up behind me and handed me a recording device that he had acquired, I believe from his squad car, and asked me to place the recording device by the doorway of the motel room.

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Q In connection with this case can you tell us what, if anything, you had occasion to learn as to how that recording device was handed to you by that officer which you then positioned in a room?

A It was my understanding that State's Attorney Roger Russell had authorized it under the emergency statute.

MR. AURNOU: Objection and move to strike unless the source of any such understanding is stated, your Honor.

MR. BOLEN: That can be pursued on cross.

THE COURT: Correct. Objection overruled.

Q Now on Monday, November 14th, when Mr. Macaro was arraigned, can you tell us whether or not he had an attorney at that time?

A It is my understanding that he did in fact have an attorney.

Q And who was that attorney?

A John Manville.

Q Do you recall whether he had any attorney in addition to John Manville?

A Not to my knowledge.

Q Between November 11th -- withdraw that. Between November 11, 1988, from the time you



Q Eight zero?

A Yes, sir, 80.

Q As I understand it, Chief, and you realize you are free to correct me if I misunderstand, my question, at any time?

A Yes, sir.

Q You got called on the 11th from the Sheriff?

A Yes.

Q Was that the first time you heard about this case in any way?

A Yes, sir, I believe it was.

Q To your knowledge was it the first time your department heard about this case in any way?

A After the fact I found out that a detective with our department, Detective Joe Gough had spoken to the New York authorities about Mr. Macaro, but I did not find out about that until the following day, which would have been the 11th.

Q Let's examine that for just a second if we could, Chief. It wasn't only Detective Gough who had previously spoken to the New York authorities, was it?

A That I don't know.
Q Well you told us you had a 25-man department, sir?

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A Yes, sir.
Q Do you also have a Deputy Chief in that department?
A Yes, sir.
Q And at that time what was his name, sir?
A Robert Bowie (ph).
Q Did you subsequently learn, that is, after Sheriff Wirth's call, that the Deputy Chief and Detective Gough had both met with Sgt. Speidel and an investigator from the Westchester County District Attorney's office at the location where your office is in Boone County Public Service building on November 10?
A I may have learned about that the following day, but at the time, on the previous Friday, I had no direct knowledge that they had done so.
Q Well let's see if I can refresh your recollection. First of all, do you read the reports that your, members of your department file?
A The majority of them, yes.
Q But you didn't see any report about the meeting or contact of the 10th between members of your department and the New York authorities at the time that Sheriff Wirth called you?
A I did not see a report, no.

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Q Now if I understand correctly there was a meeting on the morning of the 11th at which you were present, sir?
A That's correct.
Q I mean regarding this case, of course?
A Yes, sir.
Q And you understood me to mean that?
A Yes, sir.
Q Now to the best of your recollection would you tell the Court who from your department was at that meeting?

A To the best of my recollection Deputy Chief Foley would have been there, I believe Detective Gough, I believe Officer John Coduto, may have been a couple of patrol officers who were on shift that day.

Q Now Sheriff Wirth was present, was he not?

A Yes, he was.

Q Would you tell the Court, please, to the best of your recollection who else in his department was there?

A I believe a Lt. Purvis was there.

Q We are all dying to know, is he related to Melvin?

A No.

Q Anyone other than Lt. Purvis from the Sheriff's



Department?

A There is a Detective Brown, Tim Brown, Deputy Perry Gay I believe was there. Other than that at that point in time I don't recall anyone else.

Q Now we mentioned that there were New York officers there. Tell the Court who they were?

A To the best of my recollection at that time I can only say that there were two New York officers there, but at that particular time I did not know who they were.

Q You were introduced to them, weren't you?

A Once again I may have been, I eventually learned to know they were Detective Speidel and, I believe, an Investigator Bocsky, as I recall.

Q Could it have been Investigator McDonald?

A At that point in time, no, sir, I don't believe so.

Q This is on the 11th?

A Yes.

Q Anybody there from Rockford?

A No, sir, not that I am aware of.

Q How about Loves Park?

A There was a Chief Lindberg from Loves Park Police Department, I believe, was present, and Lt. Johnson from Loves Park Police Department arrived

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sometime thereafter, I think he arrived about 11:50 A.M. that morning.

Q And you want the Court and counsel to understand that that meeting -- how long did that meeting last?

A Oh, I am guessing, probably 35, 40 minutes.

Q (Continuing) That during that entire meeting neither your Deputy Chief nor Detective Gough ever told you they had spoken to the New York authorities before?

A At that time I had learned they had, but the day previous I had not.

Q That's what I was trying to get at. Okay.

MR. AURNOU: Your Honor, can I take one second just to sign something for my secretary?

(Whereupon, brief pause in the proceedings.)

Q. Now at that meeting, when that meeting began was there an arrest officer for Mr. Macaro?

A Lt. Johnson.

Q I asked you when the meeting began?

A No, there was not.

Q Please, please do your best.

THE COURT: Mr. Aurnou, don't instruct the witness, the Court will do that. Ask questions.

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Q At the beginning of that meeting was there a warrant present?

A To my knowledge, no, there was not.

Q one arrived during the course of the meeting, did it not?

A Yes, sir.

Q That came from Loves Park?

A Yes, sir.

Q Do you happen to know as you sit here now when that warrant was signed by a judge?

A I do not know.

MR. AURNOU: May I have just a second, your Honor?

(Whereupon, brief pause in the proceedings.)

Q I would like to show you what's been marked, sir, as Exhibit 4 for identification. You recognize, Chief, what that document is, do you not?

A Yes, sir, it is a criminal complaint.

Q In connection with the false impersonation charge on which the warrant was issued that day?

A Yes, sir.

Q By looking at that document does it refresh your recollection that that document was signed by Judge Riggs

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on the 11th of November?

A Yes, sir, but I never saw the document that day.

Q I am not asking you that.

A Yes, sir, it's been signed by Judge Riggs.

Q So there was a judge available at least in Loves Park on November 11th in connection with this case?

A There was a judge available, yes, sir.

Q Now you said that there was a meeting which lasted somewhere between a half hour, maybe three-quarters of an hour with ail the officers that you have described at, I guess it was your department, was it not?

A It was the Public Safety building, yes, sir.

Q I am trying to understand was it held in the area where your department resides or in Chief Wirth's department?

A In a training facility that's both of ours.

Q That you share?

A Yes, sir.

Q You have to forgive me because I am not very familiar with it. During that time was there any discussion or summary of the events that had transpired in Illinois with regard to Mr. Macaro during the time that the New York officers had been in Illinois?

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A I was advised by Chief Lindberg.

Q That's a yes or no question, sir.
A Yes.
Q And during the course of that discussion that took place did you learn that New York officers had gone to the Madison Gun Shop?
A Yes, sir.
Q And did you learn that the New York officers had made a photo identification of Mr. Macaro at that gun shop?
A I don't know that they did, no, sir.
Q You don't know that now and you didn't know it then?
A I didn't know it then.
Q Did you know in fact that New York officers had uncovered the fact that Mr. Macaro had made some purchases at the Madison Gun Shop?
A Yes, sir.
Q And did you also as a result of what you learned at that meeting, Chief, that they had a witness who was prepared to testify that in making those purchases Mr. Macaro displayed identification as a peace officer of the State of New York?
A Yes, sir.

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And did you know further that surveillance had been conducted, did you learn at that meeting that surveillance had been conducted, including by both the New York Police and members of your department that had physically located Mr. Macaro's vehicle at the Ranch Motel?
A Yes, sir.
Q Now, the Ranch Motel, Chief, just so we can be absolutely clear, is actually in Boone County's jurisdiction, about a mile outside the City of Belvidere Police Department's jurisdiction?
A Yes, sir.
Q And did you also learn that the New York officers and one of your men had gone to the motel with

photograph of Mr. Macaro and had had a photo identification made at the motel by the proprietor, whose name you couldn't remember yesterday?

A Yes, Irene Wallace, I believe, is her name.

Q She is the co-owner of that motel, is she not?

A At the time?

Q At the time?

A Yes.

Q Thank you. And did you also learn at that meeting that on the previous day the New York officers,

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in conjunction with a member of your department, had made a tactical decision not to arrest Mr. Macaro on the 10th, but to await a warrant and to make the arrest on the 11th?

A I learned that that morning, yes, sir.

Q And did you also learn at that point that that decision on the 10th, made by the officers I have described, had also been reviewed with and approved by the local State's Attorney and the Westchester County, New York District Attorney's office?

MR. BOLEN: Objection to that, your Honor.

THE COURT: Sustained.

Q Now after you left -- withdrawn. After the warrant arrived I think you told us, again you are free to correct me, Sheriff Wirth was in charge of the operation?

A That's correct.

Q And under the Sheriff's command the officers, both your department and other officers, in New York, in Illinois, repaired to the motel?

A Yes, sir.

Q Blocked off traffic?

A Yes, sir.

Q Empty all the other rooms?

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A Yes, sir.

Q Checked all the other rooms, make sure no one was in danger?
A Yes, sir.
Q Chief, that day, aside from police officers, anyone present from the media?
A I had learned that there were media in the area. As far as I know they were not in the immediate area of the Ranch Motel.
Q Do you have an outfit out there, Chief, called Action News?
A Yes.
Q Did they have a video camera at the scene?
A I can't say if they did or not.
Q Are you saying that you don't know as you sit here now, or that you don't recall, sir?
A I don't recall. I eventually learned that there was media that heard about the event and I believe more than one TV station showed up, but I can't say for sure who was there and who was not.
Q Let me ask you this, Chief. After the arrest itself was this on television?
A I believe it was, yes, sir.
Q So you know that the media was at the scene?

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I don't know.
Q What were the Loves Park officers armed with?
A As far as I know just their sidearms.
Q And were there any other law enforcement personnel present at the time that you arrived at the motel scene?
A Not that I know of.
Q Now let's take a second, please --
MR. AURNOU: Do we have Exhibit 4 still up there?
COURT OFFICER: No.
MR. AURNOU: I'm sorry, I have it.
Q The warrant that you got, sir, was from a violation of Paragraph 325 of Chapter 38 of the Illinois Revised Statute.

That is a Class B misdemeanor in Illinois, is it not?
A I am not sure what class. I believe it is a misdemeanor, yes, sir.
Q And do you recall whether or not Judge Riggs also set bail on that warrant?
A I do not know, sir.
MR. BOLEN: People's 102.
MR. AURNOU: Thank you very kindly, George.
Q I am handing you now, sir, the warrant itself,

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which is Exhibit 103, and I will ask you if that refreshes your recollection?
THE COURT: While the witness is looking, Mr. Aurnou, that's the second time. The first time I thought it was a mistake on your part. That's not "George," that's Mr. Bolen. He addresses you as Mr. Aurnou.
MR. AURNOU: I will be happy to make that correction.
THE COURT: Thank you.
Q Does that, Chief, refresh your recollection as to the amount of the bail set?
A Yes, sir.
Q And while we have it, sir, does that document also refresh your recollection to the fact that that warrant was issued on November 11th by Judge Riggs?
A Yes, sir.
Q Now at the time that the police actually sought to effectuate the warrant what time did that procedure begin, sir?
A We arrived at the motel at approximately 12:15, 12:30, somewhere in that area.
Q And after the area was, I will say "secured," but what I mean is, "cleared" of any civilians, how was

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the first attempt made to proceed?
A Deputy Brown, from the Boone County Sheriff's

office, attempted to make contact with Mr. Macaro by use of a loudspeaker device commonly referred to as a bullhorn.

Q Was that within your hearing, sir?

A Yes, sir, it was probably 30 or 40 feet in front of the motel room.

Q What exactly did Deputy Brown say over the bullhorn?

A As I recall he stated the subject's name, Mr. Macaro, this is the Boone County Sheriff's office, we have a warrant for your arrest. Please exit your room free of any arms, that I can recall. He just advised him he wanted him to exit his motel room.

Q Did Deputy Brown, over the bullhorn, announce clearly and repeatedly that Mr. Macaro was under arrest?

A Yes, sir.

Q And at that point, Chief, if Mr. Macaro had sought to exit his vehicle -- exit his motel room, enter a vehicle and drive off into the sunset would you have allowed him to do so?

MR. BOLEN: Objection. Calls for speculation.

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asked, Mr. Aurnou. Ask another question.

MR. AURNOU: Sure, your Honor.

Q At that point Mr. Macaro exited the motel was he free to leave?

MR. BOLEN: Objection.

THE COURT: Sustained.

Q Did you, Chief, consider Mr. Macaro to be under arrest at that time?

A At that time, no. At that time we had no idea he was even in the room.

Q Who were you bullhorning?

A We were soliciting if Mr. Macaro was in the room to leave his room.

Q Well actually, Chief, isn't it a fact that you had ascertained from the maid who cleaned the room that Mr.

Macaro was in his room at 9:30 when she cleaned the room and had not departed since, you had had a surveillance the whole time?

A I personally did not know that.

Q You learned it since?

A No, sir, I didn't.

MR. AURNOU: May I have just a minute, your Honor?

THE COURT: Certainly.

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THE COURT: You can answer the question.

A It does not refresh my recollection, no, sir.

Q So if this in fact occurred it would have been within Detective Speidel's knowledge, but not yours?

A That's correct.

Q What response was elicited initially by the use of the bullhorn?

A None.

Q How long did that attempt to contact Mr. Macaro by bullhorn continue before something else occurred?

A Approximately fifteen minutes.

Q Well, the bullhorn was about 12:30 in the afternoon; is that correct, sir?

A That I s correct -

Q So fifteen minutes Detective, or is it Deputy Brown?

A Yes.

Q Thank you. Deputy Brown made these repeated efforts to contact Mr. Macaro who you now know was in fact in the room?

A At that point in time, no, I did not know he was in the room.

Q I didn't ask you that, sir. I said, who you now know was in fact in the room.

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A Who I now know? Yes.

Q During that fifteen-minute period, as you told us a moment ago, he was being continuously advised that he was

under arrest?

A Several attempts were made, yes, sir.

Q What was it that happened after 12:45?

A At that time, under the direction of Sheriff Wirth, a ferret round of tear gas was injected into Room 14.

Q "Injected" is a word I may have a little trouble with. Tell us exactly what happened, Chief.

A The ferret round was shot from a shotgun into the room.

Q A single round or several?

A At that time a single round.

Q How was it induced into the room, through the door, through the wall, through the window?

A I believe at that time it was interjected through a window.

Q Did that produce any immediate response between that time and 1 P.M.?

A No, sir.

Q Was something else done at 1 P.M. other than in the room where Mr. Macaro was himself?

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A. Yes

Q Would you tell his Honor what that was?

A At that point in time we believed that if he was still in the room --

Q I just asked you what was done, sir, not what you believed.

A An inspection of the area of the motel was conducted.

Q Was a systematic search conducted of every single attached or adjoining room?

A Yes, sir.

Q And was Mr. Macaro's vehicle checked?

A Yes, sir.

Q Sometime shortly before 1:30 did certain officers, including yourself, move into position to check Mr.

Macaro's room?
A Yes, sir.
Q How did you deal with the door?
A Lt. Purvis received a passkey from the owner - Manager of the motel.
Q I want you to just take a moment, think very carefully, Chief. Was there a saw of any kind utilized in connection with the entry into Mr. Macaro's motel room?

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Q At that time was Mr. Macaro free to leave?
A No, sir.
Q Now, when the door was kicked in, sir, what happened next?
A At that point in time Lt. Purvis advised the rest of us from his vantage point that Mr. Macaro was in the motel room and that he was armed.
Q Did you or any of the officers with you proceed into the motel room or did you retreat?
A We pretty much stayed where we were at that time.
Q Did Mr. Macaro stay where he was?
A No, sir. Mr. Macaro left the living area of the motel room and went into the bathroom area.
Q What was the next step by law enforcement officers?
A We introduced more tear gas into the living area, bathroom area of the motel room as an inducement to get Mr. Macaro to come out.
Q Would you indicate to his Honor, please, how much more tear gas was induced into the living area and how much more into the bathroom area?
A As I recall there were two or three ferret rounds as well as one or two ball-type of tear gas

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give Mr. Macaro at that time?
A I advised Mr. Macaro that there was nowhere to go and that he should exit the motel room and give himself up free of any weapons.

Q Was he as he was located then, in the bathroom, completely surrounded?
A Yes, sir.
Q By armed officers?
A Yes, sir.
MR. BOLEN: Can we establish where? I'm sorry,, withdraw my objection, withdraw my statement.
Q Who had an arrest warrant?
A Yes, sir.
Q Who had announced their presence?
A Yes, sir.
Q Who had attempted, actually in fact who had utilized tear gas?
A Yes, sir.
Q And who had specifically told him repeatedly by bullhorn that he was in fact under arrest?
A Yes, sir.
Q Did Mr. Macaro, in words or substance, tell you that it was all going to be over soon and that after that

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attorney? MR. BOLEN: Objection, your Honor.
THE COURT: Sustained.
Q At any point in the recorded transcript, sir, did you come back to the subject of Mr. Macaro's attorney?
A I'm sorry, Mr. Macaro's returning?
Q Attorney?
A Attorney? No, sir, I don't believe so.
Q And, incidentally, is it correct for me to say that nowhere in this typed transcript did you ask Mr. Macaro even one question about any offense in Illinois?
A That's correct.
Q That's also correct of the conversation that you had with him before the tape arrived?
A That's correct.
Q Now, during the time -- did there come a point in time when your calm. professional persistent questioning

of this defendant resulted in his saying to you, let's not discuss it?
MR. BOLEN: objection to the form of the question. "Calm, persistent," et cetera, I object to the form, Judge.
THE COURT: Sustained as to form.

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A To my knowledge no one did prior to Mr. Macaro being taken into custody.
Q And do you know whether or not during that entire period the tape was on, do you recall whether you moved the recorder at all or attempted to do so?
A No, sir, I did not.
Q I am sorry?
A I did not.
Q Do you recall not moving it or you are just not sure?
A I did not move the recorder. once I placed it at the doorway to the motel room it stayed there.
Q At any time, sir, did you place it in a position that was inside the motel doorway?
A No, sir.
Q Did you make any effort, Chief, to get it next to the bathroom door?
A I couldn't. The door to the bathroom was fifteen to twenty feet away from where I was at and Mr. Macaro was between me and the bathroom door.
Q At one point Mr. Macaro was in the bathroom, was he not?
A He was in the bathroom initially. We didn't have the recorder at that time. Mr. Macaro exited the

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tell me if you recognize that as the signature of Detective Gough of your department?
A Yes, sir, it is.
Q His first name is Joe?
A Yes, sir.
Q I would like to show you next Exhibit 50. I ask if

you can tell me can you identify the signature on Exhibit 50?
A It looks like Detective Gough's first name, signature, G-o-u-g-h.
Q When did you first see this tip sheet, Exhibit 50?
A I don't recall that I ever saw the tip sheet until after the event.
Q Do you know or did you know at the time the source of Detective Gough's information and particularly with regard to the paragraph which says that this subject killed the subject's family and burned the house down?
A I am sorry, the question again was?
Q Do you know the source of Detective Gough's information and his tip sheet -- withdrawn.
Chief, the tip sheet is issued prior to the defendant's apprehension, we can agree on that, can we not?

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A I would assume so, yes, sir.
Q Now I am asking you, sir, for clarification of the previous question, if you know the source, and, of course, if you know the time of the statement in the tip sheet that the subject killed the subject's family and burned the house down?
A I am assuming that that information MR. BOLEN: Objection, your Honor. THE COURT: Sustained. Do you know?
THE WITNESS: No, sir, I don't.
THE COURT: That's a yes or no. You got a no.
Q In any event, Detective Gough didn't tell you, his Chief, about it at any time prior to or at the meeting on the morning of 11/11?
A That's correct.
Q At which you were both present?
A Correct.
Q And discussing this case?
A Correct.

Q Now who were the deputies that removed the defendant from the scene at the motel?
A Would have been Deputy Lieutenant Burrow and

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extent I have no objection.
THE COURT: I already heard him testify the arraignment didn't take place. If you wish to ask that do it as briefly as possible. Let's move on.
Q Just to speed this up, Chief, we are all interested in that. Is it fair that his Honor understands that there was no attempt at arraignment made, to your knowledge, between the arrest on Friday and Monday morning?
A That's correct.
Q Thank you.
THE COURT: Is it your testimony, Chief, as I recall, that court's never open Saturday and Sunday?
THE WITNESS: That's correct.
THE COURT: Go on, Mr. Aurnou.
Q On the 11th the defendant was booked at the jail after 3:00, correct?
A Yes, sir.
Q Do you know the charges on which he was booked?
A False impersonation of a police officer.
Q Anything else, sir?
A At that particular time, no, I don't believe so,

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Perhaps you would be kind enough to look at the Uniform Arrest Report and tell me if that refreshes your recollection, only to time, sir?
MR. AURNOU: Exhibit 6, your Honor.
A Time shows 3:10 P.M. on the 11th. Charges show, false impersonation of a government official and fugitive from justice.
Q About the fugitive from justice charge, do you happen to know who it was that signed the fugitive from justice complaint, Chief?

A I believe Roger Russell, the State's Attorney, Boone County, did, or at least he authorized the complaint.
Q I beg your pardon, sir?
A or at least he authorized that complaint.
Q I was more interested in who signed it. Was Roger Russell --
A He is the State's Attorney, Boone County.
Q Do you know from what source Mr. Russell got his information?
A From arrest warrant faxed to him later the evening of the 11th.
MR. AURNOU: May we mark this as an

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THE COURT: Do you understand the question?
A I don't understand the question. Rephrase it, please.
MR. AURNOU: Read back.
(Whereupon, question read by court reporter.)
MR. BOLEN: Objection, your Honor.
THE COURT: Sustained. Ask it a different way.
Q Do you know the source of State's Attorney Russell's statement under oath and in writing that Mr. Macaro had fled the State of New York after murder charges were filed against him there?
MR. BOLEN: Objection, your Honor. object to the form of the question, "murder charges filed." I don't know that there is any evidence of that.
THE COURT: Sustained.
Q Do you know the source of State's Attorney Russell's information that the defendant, after having been charged in Westchester County, New York State, with the offense of murder, fled the State of New York with the intent to avoid prosecution for that offense?
A No, sir, I can't specifically state the source.

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MR. BOLEN: Your Honor, may I see
Defendant's B, please?

THE COURT: It hasn't been offered.
MR. AURNOU: That's right.
Q Now, Chief, I would like to go back to Tuesday morning, the 12th. Were you at the jail on --
MR. BOLEN: I am sorry, I think we have the dates wrong. Tuesday would have been the 15th.
MR. AURNOU: Thank you very kindly, yes.
Q I want to go back to Saturday morning, the 12th, at the Boone County Jail and ask you if you were there that morning in connection with Mr. Macaro and some other police officers?
A I may have come to the Public Safety building, but I don't know that I came there with any specific intent.
Q Would it refresh your recollection as to whether or not the Rockford police officers came back the next morning?
A I know that the Rockford police officers came back, yes, sir.
Q As a matter of fact, with your usual courtesy you took them over to the jail, did you not?
A It is possible. I really don't recall.

**Burkhardt - for People - Voir Dire**

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frivolous position for an assistant district attorney to take. But most importantly, Judge, and I wouldn't be spending time on this exhibit if I didn't think it was truly significant, the handwritten annotation at the bottom by Max, who has been identified as a Sergeant in the Belvedere Department, and which is so significant and important, is that "The subject may be staying at the Ranch Motel, City, County and detectives from New York will be in the area trying to apprehend subject."

Now that is strictly contrary to the position that the People have attempted to insinuate into this case. They say, well, we would never have arrested him, you know, we didn't file a warrant, we just wanted to talk to this fellow and maybe, you know, advise him that somebody in his family was dead, that's all we wanted to do, despite all the other evidence in the case, but if in fact they gave a law enforcement authority to understand and to believe that they were there to apprehend, and if they participated in the obtaining of

**Burkhardt - for People - Redirect**

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when you eventually made contact with Mr. Macaro he certainly, he did not indicate to you he had any hearing problems?

A No, sir, he did not.

Q No audibility problems in terms of his ability to understand and hear things even from a distance?

A No, sir, no indicative problems.

Q Such as when you and your fellow officers initially arrived at the scene and a bullhorn was used, you had no reason to think anything other than the fact that if there was an occupant within Room 14 he must have heard whatever it was that was being explained to him over the bullhorn?

A Yes.
Q It was a substantially long period of time before anything of a verbal nature was said in that motel room to you or in your presence- is that correct?
A Yes.
Q During that particular process, even though there were people outside with weapons, with an arrest warrant, if you can answer this particular question, and you didn't know until later on, but you assumed there was someone within the room; is that correct?
A Yes, sir.

**Burkhardt - for People - Recross**

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is armed, we take sufficient number of officers to make sure it doesn't get harried.
Q The reason this time for carrying the number of officers, not the nature of the charge, but the information from New York about him possibly being armed and dangerous?
A Yes.
Q Will you also tell the Court, and I sit down after this, have you ever before in all the years that you have been a police officer in Illinois had a "B" misdemeanor charge where the warrant fixed $25,000 bail for a "B"; misdemeanor?
A I have had some pretty high bonds on misdemeanors. it is generally high, the discretion of the judge.
Q I understand all that. Do you --
MR. BOLEN: Grounds of relevancy.
Q Do you recall a misdemeanor with a $25,000 bond?
THE COURT: Sustained. Anything further?
MR. BOLEN: Nothing further.
MR. AURNOU: Have a nice flight back, Chief.
THE COURT: Gentlemen, there is one matter

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And is exhibit 94 in fact a copy of the actual teletype that went out?

A. Yes.

Q. Now, is it also fair for me to suggest, sir, that at that time the police information Indicated that you were attempting to locate Raymond J. Macaro, this defendant, to notify of a death in the family?

A. Yes.

Q. And that he may be found with weapons missing from the residence

A. yes.

Q. Now, on that same day, sir, would you just tell us again, to whom were those documents sent?

A. Which documents are that, Mr. Aurnou?

Q. The two that you just looked at, the teletype.

A. only the one document was sent, the teletype.

Q. Okay. And to whom, sir?

A. Sir, I'm not that familiar with it. As far as I know it goes out A.P.B. How many stations that hits I don't know.

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A. No, Sir, I did not.

Q. Would you tell me, please, who went with you?

A. Investigator John Bocskay of the Westchester County DA'S investigators.

Q. Had he worked with you on this case prior to that day?

A. Yes, he had.

Q. And prior to your leaving were you and he or were you briefed by anyone with regard to your activities in the State of Illinois?

A. Yes.

Q. Who was that, sir?

A. It would have been my lieutenant, my chief, ADA Kennedy.

Q. Okay. At the same time or at separate times?
A. At the same time and separate times, Yes.
Q. Okay. And did they indicate to you in particular that they were aware of a transaction alleged to have taken place through the Madison Gun Shop in Loves Park which was an area for you to investigate further?

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A. Transaction, sir? Could you --
Q. That something had taken place with regard to the Madison Gun Shop which you were going out to investigate?
A. Yes.
Q. And when you arrived in Illinois did you in fact contact the Loves Park Police Department, and in particular, Lieutenant Don Johnson?
A. Yes.
Q. That day did you make an effort to reach Mr. Charles Madison, the owner of the Madison Gun Shop?
A. Mr. Johnson, Lieutenant Johnson did try to reach out to him for us.
Q Is it correct to say, sir, that until the evening at least about 7:30 that that attempt had been unsuccessful?
A. Yes.
Q. Do you happen to recall why?
A. I can only recall, sir, that Mr. Madison was not available. His wife was pregnant at the time.
Q. It had something to do with his wife

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having a baby?
A. Yes.
Q. All right.
A. Yes.
Q. Did Mr. Madison finally make contact with law enforcement -- Lieutenant Johnson, yourself -- by phone at about 7:30 that evening?
A. Yes.

Q. That's on the 7th, sir, the day you arrived in Illinois?
A. Yes.
Q. And was he requested to be available at his place of business so that you could proceed with your investigation?
A. We did meet him there, yes.
Q. Well, before you met him there was he requested to attend?
A. He was asked if he could meet us there, yes.
Q. His place of business was closed at that hour, was it not?
A. No, sir. I don't remember. I'm sorry, sir, I don't remember.
Q. You don't recall?

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A. No, I don't recall.
Q. Would you tell the Court please who was present at the gun shop the evening of November seventh -- which by the way was a Monday, was it not, sir?
A. Yes.
Q. Okay.
A. Could I refresh my memory with my report, sir?
Q. If you need to you are welcome to at any time, Lieutenant.
A. Thank you, sir, if I might.
MR. AURNOU: Would you please give exhibit 8 to the witness.
(Exhibit 8 was handed to the witness.)
Q. Let me ask you this. Before you read the report, do you have any independent recollection of that night?
A. Yes, sir, I have some recollection.
Q. Before you look at the report, tell me what your independent recollection is of who was there that night?
A. James Madison, Charles Madison, and I

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believe another employee might have been there that night.
Q. And the police officer, sir?

A. Of course, Lieutenant Johnson and Investigator Bocskay.
Q. And yourself?
A. And myself, yes.
Q. Okay. Now, do you want to look at the report and see if there is anything else in there you want to add?
A. Yes. (Pause.)
Q. You're just looking now for who was there?
A. Yes, sir.
Q. And is there anything else you want to add?
A. Not at this time, sir.
Q. What page is that, sir?
A. Page 32-A, sir.
Q. Thank you. Now, at that time what did you tell Charles Madison about your purpose?
A. I told to Mr. Madison that we were there attempting to locate and question a Mr. Ray Macaro.



Q. To locate?
A. To locate and question a Mr. Ray Macaro.
Q. Did you tell him anything more than that?
A. We might have told him that we were there in relation to a homicide that occurred in Eastchester, and a fire.
Q. Did you tell him that you were there in connection with a triple murder?
A. That's what I said, sir, yes.
Q. Did you tell him that you were there in connection with an arson?
A. Yes .
Q. And did you tell him that Mr. Macaro had committed those crimes?
A. No sir.
Q. You're sure of that?
A. Yes.
Q. okay. And what did you tell him about --

MR. AURNOU: Withdrawn.
Q. What did you ask him?

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A. I asked him, sir, and the other officers with me, if he had had any business dealings with Mr. Macaro or if he had seen Mr. Macaro --
Q. Let me stop you there right there.
MR. BOLEN: Your Honor, the
witness --
Q. The questioning of Mr. Madison was conducted, was it not, by the two New York officers, not by Lieutenant Johnson?
A. Yes.
Q. okay. Now, would you continue with your answer, please.
A. Okay. We asked him, sir, if he had had any business dealings with Mr. Macaro.
Q. What did he tell you?
A. He said yes, that he had. Mr. Macaro had dropped several guns off there on consignment to be sold, he had been there several times, he was waiting for him to come back because he had some money for him. And we were also told that -- at one time we were also told that on one occasion he had also bought a can of Mace, some Mace. I'm

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sorry. He also bought a Slim Jim, which is a car opening, which is a car opening device.
Q. What did Charles Madison say about that event?
MR. BOLEN: objection. It hasn't been established as to who related that information. Assuming something not in evidence yet.
Q. All right. Did Charles Madison tell you that?
A. No, sir.
Q. Who did?

A. James Madison.
Q. Where was Charles Madison when James Madison told you that?
A. I don't recall, sir.
Q. Were you all wandering around the store or were you all in one place?
A. It's a large store, sir.
Q. I didn't ask you that. I asked you were you all in one place?
A. At all the time I could not remember, sir, I could not tell you.
Q. Now, would you tell me what you heard

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that night about the purchase of a can of Mace, cans of Mace, and any other object?
A. He also purchased a slim Jim, and at that time he showed a shield and an ID which they took to be a police or peace officer.
Q. Now, let's stop just a moment. Were you aware either then -- just a moment. Just a moment. Are you aware either then or now of any provision of Illinois law that restricts the sale of either the Slim Jim or Mace to a peace officer?
MR. BOLEN: Objection; grounds,irrelevant.
THE COURT: Sustained. Sustained.
Q. Did you take a written statement from any person at that time?
A. No, sir.
Q. Did you take a written statement concerning that event from any person at any subsequent time between then and November the 11th ?
A. No, sir.
Q. After you learned that Mr. Macaro was owed money and was anticipated back, what if

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anything did you tell Mr. Madison concerning your intended course of action with regard to Mr. Macaro?

A. I don't remember telling Mr. Madison anything at that time, sir.
Q. Did you tell Mr. Madison in words or in substance that you planned to have a stakeout at his place of business?
A. I don't remember saying that, but it's possible, sir, I might have said that, that we were going to try to survey for Mr. Macaro.
Q. Let me assist you. Was it said either by you or another officer in your presence?
A. That's possible, sir.
Q. You're just unable to recall?
A. I don't recall what we said to Mr. Madison in reference to that.
Q. I'm sorry?
A. I don't remember what was said to Mr. Madison in reference to that.
Q. Did Mr. Madison give you a list of the weapons that Mr. Macaro had consigned?
A. Yes.
MR. BOLEN: objection. Your

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Honor, can we clarify we have more than one Madison here which Madison are we talking about?
Q. All right. Would you tell us, please, Lieutenant.
A. Yes, sir, we did get a list, receive a list.
Q. From Charles Madison?
A. I don't remember, sir.
Q. Did you also receive physically in a duffle bag or place in a duffle bag all of the weapons belonging to Macaro that Mr. Madison had in his possession?
MR. BOLEN: Can we have a time-frame on that, please?
MR. AURNOU: November 11th, that evening.
MR. BOLEN: That day?
MR. AURNOU: November 7th, excuse me, that evening.
MR. BOLEN: I'm a little bit confused. We are talking about November 7th and then we went to November 11th.

afternoon of the tenth did you have Illinois law enforcement personnel present with you?

MR. BOLEN: My objection is basically to form. Is it the afternoon or the evening? We haven't established when that was on the tenth.

Q. Can you tell us exactly what time it was that you had located the vehicle?

A. Can I refresh my memory, sir?

Q. Sure. Would you like exhibit 8?

A. Excuse me?

Q. Exhibit 8.

A. Sir, I don't remember what time it was and I didn't mark it on my report, what time.

Q. is it not a fact that prior to 5:30 p.m. on the evening of the tenth of November, 1988 you met with Detective Gough and went to the post office, Black Hawk Gun Shop and the Ranch Motel where you located Mr. Macaro's car?

A. Yes. We located the vehicle at that time.

Q. Right. And at that time, 5:30, did you have a meeting with Detective Gay and Detective Gough at the Belvedere Police Station and pick up



investigator Bocskay?

A. Yes. I don't remember the time but I did pick him up.

Q. And as soon as Investigator Bocskay and Sergeant Brown of the Sheriff's Office were present, you established prior to seven p.m. that night that the owner could identify the occupant of room 14 as being Raymond Macaro, Junior?

MR. BOLEN: objection.

THE COURT: Sustained. I didn't follow that.

MR. AURNOU: Maybe I asked it wrong.

Q. All right. Is it a fact, sir, that by 7 o'clock you had shown the owner of the Ranch Motel a photograph of Ray Macaro, Junior and she had identified the person depicted in

that photograph as the occupant of room 14 at the Ranch Motel?

A. Yes.

Q. Now, at the time that the owner of the motel made that identification, you had with you Sergeant Brown and other Illinois law enforcement personnel; correct?

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A Yes

Q. Would you tell the court what steps if any were taken at that time to arrest Mr. Macaro for violation of the Illinois offense?

A. No steps were taken at that time, sir. It was getting very late at that time.

Q. I just asked you what steps were taken at that time. Now, did you in fact or Investigator Bocskay in your presence place a phone call to the District Attorney's office of Westchester County?

A. I don't know, sir. I don't remember.

Q. You don't recall?

A. I did not.

Q. Is it correct to say that the following day --

MR. AURNOU: Well, withdrawn.

Q. If no steps were taken to arrest Mr. Macaro on the tenth, was there any surveillance established at the Ranch Motel overnight on the tenth?

A. I'm not aware of that, sir.

Q. on the eleventh was there a tactical

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superiors and/or Assistant District Attorney Kevin Kennedy that they did not want a warrant of arrest obtained or a criminal complaint filed at that time?

MR. BOLEN: Objection to the form the question.

THE COURT: I'll allow it if he understands it.

A. That wasn't discussed that way, sir, no. We wanted to locate and question Mr. Ray Macaro.

Q. I understand that. My question was regarding a

complaint and warrant and a warrant of arrest. What discussion did you have at that time with the senior members of your department and with the Assistant District Attorney Kevin Kennedy?

A. I can't remember verbatim what was said, sir, but there was no warrant issued.

Q. I didn't ask you verbatim; I would be happy to take the substance, Lieutenant. But was it not a fact that the substance of that discussion between your department and your superiors and Assistant District Attorney Kevin

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Kennedy to the effect that it was not desired at that point in time to file a criminal complaint or obtain a warrant?

A. We were still in the investigation stage of this investigation, sir, there was no warrant for us to get at that time, no.

Q. Now would you answer my question, please?

A. We were still in the investigation.

Q. My question was the discussion sir, did the district attorney or the superior in your department tell you that they did not desire at that time to obtain a warrant. or to file a criminal complaint?

A There was nothing filed at that time, yes.

Q. I guess i'm not making myself clear, Lieutenant. I apologize.

A. There is not much more I can tell you sir.

Q. I'm asking you more specific conversation.

A. I cannot give it. Not verbatim. I'm asking you to give

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me the substance as best you can, recognizing that it's been a long time, okay, and that you're trying to be helpful. But was it not the fact, sir, is it not the fact that at that point in time when the authorities here in New York, including yourself, the chief, Lieutenant Hunter and ADA Kennedy talked about this case, the consensus was we will not seek a warrant of arrest and we will not file a complaint at this

time?
A. Yes, that, we would not file at this time.
Q. Now, when you got out to Loves Park and you talked with Lieutenant Johnson, was any other law enforcement officer present?
A. investigator Bocskay.
Q. Any other law enforcement officer from Loves Park or any other Illinois agency?
A. Not that I remember, no.
Q. Okay, You told us that you advised Lieutenant Johnson of the three homicides and of the arson.
MR. BOLEN: Objection; asked and answered,

**Direct - Madison**

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A Yes
Q. Children?
A. Three children.
Q. And have you ever been convicted of a crime?
A. No, sir.
Q. And I'd like to ask you, sir, what is your present occupation?
A. I'm the business manager for a Ford dealership in Illinois.
Q. And in November of 1988 what business if any did you own?
A. I was the president of a company that owned a gun shop.
Q. And what was the name of the shop and where was it physically located, sir?
A. It was Madison's Gun Shop in Loves Park, Illinois.
Q. And on November 7th of 1988 were you and your wife involved in some domestic matter?
A. She was going to have a baby.
Q. Okay. Had you been out all that day with her testing and so forth?
A. Yes. She was like two and a half weeks

over the day she was supposed to have the baby.
Q. And did you learn at some time that day that the police were trying to contact you?
A. Yes.
Q. And at 7:30 that night did you in fact make a phone call to Lieutenant Johnson?
A. Yes.
Q. What if anything did the police tell you?
A. They wanted to meet me at my place of business. I called them from my house.
Q. Okay. Now, your place of business, what time of day would that have closed on Monday, November 7th, 1988?
A. At six o'clock in the evening.
Q. So by the time you called him that business was closed for that day?
A. Yes.
Q. When they told you they wanted to meet you there, were you agreeable to that, Sir?
A. Yes.
Q. What did you understand the purpose or what did you think they were asking you there for?



A. (No response.)
MR. BOLEN: Objection. What was he told?
THE COURT: Sustained.
Q. What were you told about over the phone?
A. Over the phone I was told very little about the purpose of it, that 1 had to meet them there or I had to meet him there.
Q. Okay. Now, a gun shop, is that business subject to inspection without notice by law enforcement authorities
A. It can be, yes.
Q. Had it in fact been?
MR. BOLEN: Your Honor, this is his own witness and he's leading. I haven't objected before, but now I object to it,

from here on out, to leading questions.

THE COURT: I'll allow the answer to this question. But, Mr. Aurnou, let's move ahead.

Q. In any event did you respond to the gun shop, sir?

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A. That evening I went there, yes.

Q. What time roughly did you meet with the officers?

A. 7:30, eight o'clock, somewhere in there.

Q. Okay. And which officers were there that you knew and from what jurisdictions

A. There was a gentleman from the Loves Park Police Department.

Q. Who was that?

A. Don Johnson.

Q. Did you know him?

A. Yes. Mr. Johnson?

A. From being in the same city I knew Don.

Q. You had known him for years?

A. Yes.

Q. Okay. And what if any other law officers were with him?

A. There were two other gentlemen there from an out of state agency.

Q. Well, did you come to learn what state they were from?

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A. Yes. They told me they were from New York.

Q. All right. And at that time who if anyone else was present at the gun shop from your staff?

A. Just myself.

Q. Now, to the best of your recollection, sir, did the officers ever tell you, the New York officers, why they were there?

A. Yes. They told me a person who had been in my store had committed a crime in their state, and they had found him through a telephone thing at my store, and they were here to take him back to -- well, they didn't say. They wanted to

know if I knew the guy and all that.

Q. Okay.

A. Yes.

Q. Did you cooperate?

A. Yes.

Q. Did you in fact at that time know who Mr. Macaro was?

A. Yes.

Q. When if at all had you met or seen Mr Macaro?

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A. Probably two or three weeks prior to that.

Q. On that one occasion or more than one occasion?

A. More than one occasion.

Q. Was it a particular time of day, sir?

A. Usually always early in the morning, before I opened.

Q. Okay. And during that period of time did Mr. Macaro ever tell you anything concerning his occupation at any time in the State of New York?

A. No.

Q. Did he ever bring up the subject of law enforcement?

A. No.

Q. Did he in fact --

MR. BOLEN: Your Honor, it's leading.

Q. Did he in fact --

THE COURT: I'll allow it. Go ahead. And did he in fact leave anything with you?

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A. He had a considerable amount of guns, that's how I got to know him, that he wanted me to buy, of a quality that I couldn't afford to buy, so I was selling them for him one at a time.

Q. You mean like on consignment?

A. On consignment. And did you also have occasion to perform some work, repairs, modifications, whatever, on any piece of equipment belonging to Mr. Macaro?

A. There was a shotgun he wanted me to take, they call it a plug out of, and I knew how to do it so I did it for him.

Q. Okay. And at that time, sir, did he bring up anything to do with New York law enforcement?
A. No, sir.
Q. As of the moment that you met with the New York officers at the gun shop, before they greeted you but when you physically just saw them, did you have any knowledge that Mr. Macaro had ever been any kind of law officer in the State of New York?

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A No, sir.
Q. And that night while you were at the gun shop and while you were talking to the New York officers, did you tell them or even suggest to them
MR. BOLEN: Your Honor, counsel --
Q. to them in any way --
THE COURT: Sustained.
MR. BOLEN: Objection; leading. THE COURT: Sustained. sustained.
Q. anything --
THE COURT: Sustained.
MR. BOLEN: objection.
Q. That evening, Mr. Madison, did you have any communication with the New York law enforcement officers or with the Illinois officer in their presence concerning Mr. Macaro and any status he might ever have had in the state of New York?
A. No, sir.
Q. Did the subject of Mr. Macaro having a badge ever come UP in that conversation?
A. With me, no.
Q. Did it come up in your presence?

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A No, sir.
Q. Was there anyone else from your staff there that night as you recall it?
A. Not that I recall.

Q. Did the police ask you for an inventory of the weapons that Mr. Macaro had left?
A. I think I volunteered it, because I don't think they knew I had these guns, but I gave them the list and showed them the guns.
Q. Okay. And did they subsequently take those guns from you?
A. Yes.
Q. All right. Now, what if anything did the police tell you about Mr. Macaro's conduct in the State of New York?
A. That this gentleman had committed a crime there and that's why they were here.
Q. Well, did they tell you what the crime was, sir?
A. They said that he had killed his
family.
Q. And did they tell you anything else about his house?
A. They told me how he supposedly did



these things.
Q. They told you how he supposedly did these things. And what did they tell you about that?
A. That he was -- lie had shot his family, beaten his family, and burned his family. But I don't remember if it was at the home, or in the building, or -- I don't know.
Q. okay. And did they make any inquiry of you regarding the present whereabouts at that time of Mr. Macaro?
A. (No response.)
Q. Did they ask you if you knew where he was?
A. Yes.
Q. And what if anything did you tell the officers?
A. Well, everything T had as far as receipts, because I wrote him a receipt when he dropped the guns off; there was no address or phone number so I didn't know. I knew that he was supposed to come back.
Q. Did you tell that to the officers?
A. Yes.

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Q. What did you tell them if anything about how you knew he was supposed to come back?
A. I had sold so many guns, and he would come in, I don't know if it was every other day, but it was every day for a while, but to pick up the money from the sales of the guns from the day before, or to come in to get his funds.
Q. Well, at that time did you have any money that you owed him or that belonged to him?
A. I don't recall, but according to what I've been told I had some of his funds, yes.
MR. BOLEN: According to -- I'm sorry. According to what you've been told?
THE WITNESS: Yes.
MR. BOLEN: Thank you.
And did you tell the officers that you were expecting him to pick up money at that location?
A. Yes.
Q. Sir?
A. Yes.
Q. What if any information did the officers give you about what they were going to

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do regarding Mr. Macaro?
A. I was told that since they didn't know where he was and he had been a regular in our store that they were going to watch the store until he came back, because they figured held come back.
Q. And did they say what they were going to do if he came back while they were watching the store?
A. They were going to arrest him.
Q. And what exactly were the words the officers used?
A. My discussion with them was that I wasn't--- I couldn't be there when this was going to take place so I wanted to know how it was going to happen. And I was told that they were going to arrest him in my store, outside of the store; one way or the other they were going to arrest him at

my store if he showed up at my store.
Q. And when the officers -- and is this the New York officers that we are speaking of now?
MR. BOLEN: Oh, please.

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Objection
Q. Or the Illinois officers?
THE COURT: Sustained.
MR. BOLEN: This is direct examination, Mr. Aurnou.
Q. Which officer or officers told you that, was it the Illinois or the New York officers?
A. The New York officers.
Q. Okay. And when they told you that one way or another they were going to arrest him, did they indicate for what offense or offenses?
MR. BOLEN: Objection to the form of the question. I don't recall the witness saying they said one way or another.
THE COURT: Sustained.
MR. AURNOU: Your Honor, I'd be happy to have that read back, it's in the transcript.
THE COURT: Mr. Aurnou, ask another question.
Q. When they told you that they were going to arrest him one way or another, did they

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indicate whether or not that was for crimes in Illinois or New York?
A. It was -- I mean, I just, I guess I thought, expected it was for the crimes in New York.
MR. BOLEN: Your Honor.
THE COURT: All right.
Q. So is that what you understood him to say?
MR. BOLEN: Your Honor, in view of the last response I object to Mr. Aurnou's question.
THE COURT: I will sustain the objection.
Q. Did the officers tell you in words or in substance, or

give you to understand through their conversation --
MR. BOLEN: objection.
THE COURT: sustained. All right, it's already leading.
MR. AURNOU: Could I finish the question?
MR. BOLEN: No, I object.
THE COURT: No.

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THE COURT: Asked and answered. sustained.
Q. And did the officers indicate to you what they planned to do if Mr. Macaro resisted arrest?
MR. BOLEN: objection.
THE COURT: Sustained.
Q. What exactly did the officers tell you they would do if and when Mr. Macaro showed up at the gun shop during their surveillance?
A. I really didn't get -- nobody ever told me what was going to happen. I had to ask.
Q. Okay. When you asked what did they say?
A. That one way or the other if he showed up at my store they were going to arrest him, that was why they had the van parked outside, or the truck or whatever it was. And I cooperated with this because I've always worked with any agency in the area. And I really felt -- I don't know how much you want me to volunteer, but I really felt and I really believed that these people from New York, I really believed this man did these things from

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what I had heard. So I wanted to cooperate, but I sure didn't want to have anybody shot or even arrested in my store. It's just not good press.
Q. Were you afraid it would happen at your place of work?
A. Well, considering they thought it was going to happen there, so I figured that they knew better than I did.
Q. okay. Now, your wife and you had a baby the next day, early?
A. Yes.

Q. And during that day did you maintain any contact at all with your place of business?
A. I called them on and off during the day to make sure of -- I wanted to be kept abreast of what was going on.
Q- That was -- was that part of your concern about this case?
A. Yes.
Q. Now, on the eleventh of November there was in fact an arrest of Mr. Macaro?
MR. BOLEN: Objection, your Honor.
THE COURT: sustained.
Q. Did you have occasion to watch

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bill for any of those items or to accept payments for any those items?
A. Yes, I did.
Q. Now, I want to return for just a moment to your business itself. Is that a business that had been in the family for some time?
A. Yes.
Q. And when did you purchase it?
A. In 1985 I believe it was. The fall of 1985.
Q. It had been your father's and grandfather's before that?
A. Yes.
Q. Did that business sell Mace?
A. Yes.
Q. And at that time in the course of your business was it your practice or the practice of any employee of that business to require any type of identifications from an adult purchaser of Mace?
A. No.
Q. Was there any requirement of law of which you were aware at that time that any person purchasing a can or cans of Mace show any kind of

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identification or have any particular status?

A. No.
Q. All right.
A. None to my knowledge.
Q. And did you also, sir, at that time market a device which is coiloquially known as a slim Jim?
A. Yes
Q. And you're familiar with that also in your automotive business?
A. Yes .
Q. Is that a device which in November of 1988 required any particular status of an adult purchaser in order to be able to buy that freely over the counter?
A. No.
Q. All right.
A. To my knowledge anyone could buy one.
Q. Okay. And did you, when you sold those, and your employees when you sold those at your store, require any kind of identification or any kind of --
A. No.
Q. Anything else of any purchaser of a



slim Jim?
A. As long as the person looked like they were old enough.
Q. You mean they had to be over 18?
A. There is no -- I don't think so. I don't think there is a written age, but we just tried to make sure whenever we sold those kind of things that it looked like a real person, you know.
Q. An adult?
A. Yes.
Q. Now, at any time to your knowledge and recollection did any Illinois officer take a statement from you regarding Mr. Macaro or any of the events that had transpired at your store which you signed?
A. No.
Q. To your knowledge did any Illinois or New York officer

take any such statement from any other person who worked at your shop?
MR. BOLEN: If he knew.
THE COURT: sustained.
Q. Do you know whether any such statement was every taken from any other employee of your

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shop?
A. Not to my knowledge.
Q. And to your knowledge was any request made of you or any other employee in that shop in November of 1988, or at any time since then, to testify regarding Mr. Macaro prior to today?
A. Could you ask the question again? don't understand.
Q. Sure. From November of 1988 right up until today when you are here testifying, do you know of any other request either of you or any other person in the store to testify about Mr.Macaro?
MR. BOLEN: Objection. THE COURT: Sustained.
Q. Were you ever asked to assist or participate in an Illinois prosecution of Mr. Macaro for false impersonation of a police officer?
A. No.
Q. All right.
MR. AURNOU: Could I have just one second, your Honor? I'm looking for a document.

**Lavian - Direct**

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his friend outside the facility, and that the staff would pay for that. In other words, he was threatening us that he didn't want us to ask him to come to the team meeting.
Q. Doctor --
MR. BOLEN: withdrawn. I have nothing further.
THE COURT: You may inquire.
MR. AURNOU: Thank you.

BY MR. AURNOU: Now, Dr. Lavian, I believe you said that you took your basic medical training in Iran, is that correct?

A Yes.

Q And you graduated with a degree from the University of Tabriz when, sir?

A 1966.

Q Was that in November of 1966?

A Yes.

Q You came to the United States, I believe you said, in 1980, is that correct?

A. Yes, sir.

Q. In the intervening fourteen years what was



your occupation, and where?

A. I had a teaching position in the University of Risashau which is in the northern part of Iran, called Babol, B-a-b-o-l. I also have a private practice,, and also I was working for the Educational Department of Iran.

Q. Did any one of those things, Doctor, relate to psychiatry, or were they in a different field of medicine?

A. At that time I practiced as an internal medicine. But, as you may know, as an internal medicine I used to see a lot of psychiatric patients at that time.

Q. But your specialty at that time was internal medicine?

A. Yes, sir.

Q. Did you ever have a specialty, Doctor, in pediatrics?

A No, sir, I did not have.

Q Are you now or have you ever been a member of the American Pediatric society?

A No, I am not.

Q Doctor, how do physicians get listed in the New York State Directory, could you tell us that?

A If a doctor has a license to practice he might get his name in that directory.
Q But you would fill out the information for the New York State Directory yourself, each doctor individually, correct?
A Yes, sir.
Q And at the time that you did that,-did you advise them that you were a member of the American Pediatric Society?
A No, it's the Psychiatric Society. It's not the Pediatric Society.
Q Now, Doctor, you came here in 1980, and between 1980 and 1982 what, if anything, were you employed as?
A Could you rephrase your question?
Q Sure. I'm asking you what type of work, if any, you did in the field of medicine between 1980 and 1982?
A I was studying medicine to apply for a special test that requires to start the practice of medicine in the United States.
Q And you told us that you began a residency and practiced psychiatry in 1982?
A Yes, sir.



Had you taken the special test at that time?
A At that time I passed the ECFMG, and also I passed the FLEX.
Q In Indiana?
A Yes.
Q Were you admitted to practice in New York at that time?
A The hospital --
Q No, Doctor. You understood my question. You were not admitted to practice in New York in 1982, correct? It's a simple yes or no, Doctor?
A I was working --

Q Don't be tangential. Just answer the question.
MR. BOLEN: Objection.
THE COURT: You may answer the question.
A No, I did not have a license at that time.
Q And you said that you continued on the staff of a group that was associated or related to Columbia University, is that correct?
A I said I worked in hospitals affiliated with Columbia University.
Q Did you essentially work at Middletown? Was that your primary location?

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A Yes. It was an affiliation to Columbia University.
Q I understand that. But your primary location was in Middletown?
A Yes, sir.
Q And in 1985 you obtained licensing in New York State?
A Yes, sir.
Q And at that time I believe you told us in July of 1985 you obtained a position with the Mid-Hudson Psychiatric Center, is that correct?
A Yes, sir.
Q Now, Doctor, I heard you say you were a psychiatrist on their staff, is that correct?
A Yes, sir.
Q Are there, in fact, more than one position or more than one grade of psychiatrists at Mid-Hudson, psychiatrist one, psychiatrist two?
A Yes, sir.
Q Do you understand me?
A Yes.
Q Now that we have that down, would you please tell the Court what is your position?
A My position is psychiatrist one.

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Q Is that the most senior level, Doctor?

A No, it's not.
Q Is that the most junior level, Doctor?
A I cannot say the most junior, but it is a level of the psychiatric staff.
Q It is an entry level, Doctor, is that correct?
A I cannot say entry, but if you wish to say. It might be --
Q Let me put it another way, Doctor. I'll make it easier for you. Is there a lower paid position than psychiatrist one at Mid-Hudson?
A Based upon a year of practice and seniority, there is a difference.
Q Not the practice, Doctor. I'm talking about the rank. That is the lowest salaried psychiatric position on the staff of Mid-Hudson, isn't that correct?
A It might be.
Q And you have been in that position constantly without promotion since 1985, is that correct?
A Yes, I've been there as a staff psychiatrist since --

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Q Now that we understand that, Doctor, are you board eligible in forensic psychiatry?
A I am board eligible, yes.
Q I'm sorry?
A I'm board eligible in psychiatry.
Q And are you also board certified in psychiatry?
A I'm not board certified.
Q You're not?
A I'm board eligible.
Q Doctor, how long have you been board eligible?
A For a couple of years now.
Q How many times, if ever, have you attempted to become certified?
A Twice or three times so far.
Q Three times so far?
A Yes.

Q If I understand you correctly, Doctor, that means that you have been tested by your peers three times, and found not sufficiently skilled to be certified on the basis of each of those examinations, correct?
A If you say so.

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Q No, not if I say so. Doctor, I want you to say so. That is what it means.
A That in my opinion, that does not necessarily mean that. What happens, the written examination is a two part examination. If in the neurology and in psychiatry portion, and I have passed a score for psychiatry, and sometimes T failed in neurology. That's a written examination. But that does not necessarily mean I am not a qualified psychiatrist. By any law, there is no such thing. This is my understanding, but I don't know.
Q But you are certainly not a certified psychiatrist?
A No, certainly I am not a certified psychiatrist.
Q After three examinations?
A (No response.)
Q Now, Doctor, you told us that you became by the way, Doctor, did you ever receive any degree especially related to or focused on psychiatry, any graduate degree in psychiatry?
A As I mentioned to you, I completed four years residency in psychiatry.
Q Doctor, you understand the difference. If

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my language is not complete or clear, please stop me. I will not be embarrassed.
MR. BOLEN: What degree are you calling for --
Q what did you --
MR. BOLEN: May I be heard, your Honor? What degree is he looking for. He's a graduate of a medical school, licensed to practice, and he did a residency, I know of no specific degree in psychiatry. We've already gone beyond board certified. If you want to continue, go ahead, Mr.

Aurnou.

MR. AURNOU: Sure.

Q Did you ever receive a doctorate in psychiatry?

A No.

Q Did you ever receive a certificate evidencing your successful completion of any course in psychiatry, other than a residency?

A Yes, sir.

Q Which was that?

A I attended New York University for six months. I went to Yale and finished a course of comprehensive psychiatry and neurology. I attended

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Chicago University for a complete course of comprehensive psychiatric and neurology, and I received certification for that.

Q And it was after all of that that you failed the certification three times, Doctor?

THE WITNESS: Judge, can I ask what is the meaning of this?

MR. AURNOU: I'm trying to find out if he took it before or after.

THE COURT: Did you get that certificate before?

THE WITNESS: No, I have not. But I have applied next fall for a written psychiatric examination.

THE COURT: Okay.

Q Now, you mentioned that you were a member of the American Psychiatric Association?

A Yes.

Q Did I understand that correctly, Doctor?

A Yes.

Q Would you please tell his Honor, is there one and only one or more than one type of membership in that association?

A There is different types of memberships in

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A Yes. And he also in several occasions mentioned that

he would do something or he would call his friends outside, and the staff would have to pay for that. Whenever I tried to --

Q Wait, let's stop there. He said he could call friends on the outside, and the staff would have to pay for that?

A Yes.

Q Now, Doctor

A it means that -- go ahead.

.Q Doctor, did you make any attempt at all to find out if this was a factual fact based statement, or whether it was pure fantasy?

A I can say on numerous occasions I tried to interview Mr. Macaro I tried to see him. I requested many, many times him to come and sit with us and talk to me. And he refuses. He would say that "I don't have any relationship with you. I fired you. You are terminated-"

Q Did you have any discussion with him over the logic or lack of logic or reality of his thinking he could fire you?

A We tried on many occasions. When I say we, as well as my staff, as well as my unit chief and other

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disciplinary staff, we tried to let him know that there is no such a situation that he could fire me at this moment. He is better to sit down and talk to me and give me the reason. But he would not be cooperative. He would not answer my questions. So, he selectively tried not to be cooperative with me.

Q Was there any advantage to him, for example, Doctor, in not being removed from assault precautions?

A Since I was not aware of his intention, I believe for his own protection, as well as -

Q I think you misunderstood me, and I apologize if it's my fault.

A Please.

Q I'm trying to get to you explain to his Honor --

A Yes.

Q --whether there was any advantage you can imagine

to be gained by Mr. Macaro by having to remain on assault precautions rather than tell you that he didn't intend to assault anybody. Assault precautions is a great disadvantage, is it not, to the patient? It restricts his freedom of movement? That's the purpose of it?

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information from him of any value, did you?

A On that date?

Q Yes.

A Yes, sir.

Q Now, Doctor, to the best of your recollection, between the date that you admitted him in April 14th and the day that he was discharged two and a half months later on June 27th, did you have even one cooperative, one full length discussion with Mr. Macaro?

A No. Personally, I was unable to establish, because he was, as I mentioned --

Q I didn't ask you why, Doctor. I asked you whether--

A No.

Q And would it be fair to say, Doctor, with no criticism of you intended, and please understand that, would it be fair tore for me to say that because you could never overcome Mr. Macaro's resistance, a version, hostility, whatever it was, you were not ever able to establish a treatment, relationship or modality with him?

A I cannot say that I was unable to establish a treatment plan for him.

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Q I didn't ask you that. I said a relationship, Doctor, a one-on-one relationship. There simply wasn't any?

A That's right.

Q Now, you mentioned, Doctor, that as part of this team approach that you had at Mid-Hudson, that you have various other people who would have contact with Mr. Macaro?

A Yes, sir.
Q Correct?
A Yes, sir.
Q Now, one of those people, at least, and there may have been more than one, but at least one was a psychologist, is that correct?
A Yes, sir.
Q In the case of Mr. Macaro's second admission between April and June of this year, who was that psychologist?
A Sarah Parker Cottage.
Q Was there any other psychologist?
A No.
Q And you also mentioned social workers.
During this second admission who was the social worker that was responsible for Mr. Macaro between April and

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today. It's still used up to today.
Q. For what purpose?
A. The Stamford Benit is an intelligence test that would specify whether the patient intentionally refused to answer or failed to answer specific questions. For example, if the patient is-able to perform on the level of a nine year old person, and then that person failed to perform the same test for a six year old boy or girl, it means that there is some discrepancy. This is the grounds that we look at it and we might establish a diagnosis of malingering based on that interpretation that we have from the test.
Q. Doctor, what is the leading text on malingering in your field?
A. In my view, based -- the malingering I did not put in my diagnosis, because I did not have a chance to do my own psychiatric tests --
Q. But is there a leading text that every professional in the field knows, and would know it's the leading text on malingering?

A. There is no such thing that every person believes that one special test is leading or that one

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special book is a leading book in psychiatry.
Q. Dr. Lavian, are you familiar with the book on the Clinical Assessment of Malingering and Deception by Dr. Rogers from Chicago? Are you familiar with that book?
A. I am familiar with that book, but I also had an opportunity to read other books regarding malingering.
Q. Is that book generally accepted in your profession as an authoritative and leading text?
A. I cannot say that it's accepted by all of the psychiatrists.
Q. I didn't ask you that. I asked you if it is generally accepted in your profession as a leading authority in the field?
MR. BOLEN,. The witness has answered the question, your Honor.
MR. AURNOU: I don't think he has, your Honor.
THE COURT: If you could answer the question again, please.
A. Rephrase the question.
Q. Would you read it back.
(Whereupon, the prior question was read

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back by the Court Reporter.)
A. I'm not sure. I' don't know.
Q. What text is so accepted?
MR. BOLEN: objection, your Honor.
Q. Do you know that?
MR. BOLEN: objection on the grounds of this line of inquiry.
THE COURT: Sustained.
Q. Doctor, did you make any attempt to find out what psychiatric tests had previously been administered to Mr. Macaro?

A. I'm sure it was in the records, but at this point I don't recall specifically. But I'm sure that was done before.
Q. What I'm trying to find out, Doctor, is do you know, either now or at the time that you came to your opinion, whether when Mr. Macaro was twice determined to be unfit to stand trial in Illinois, that was on the basis of psychological testing, as well as clinical observation?
A. Maybe at that time. I don't know. maybe at that time he was.
Q. But you don't know?
A. I give my opinion based on my observation

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Q. Do you remember the question I asked you, Doctor?
A. You asked me regarding any change in his mental status from admissions the day that he was discharged.
Q. Could you answer the question, please, Doctor?
A. I did not see any significant changes in his mental status, as he demonstrated no signs of disorganization from admission to the stay of two months or more than two months.
Q. And, Doctor, in addition to there being no change,- you've already told us there was no testing, and that he wasn't cooperative to that?
A. Sir, he was not cooperative with the psychological tests, yes.
Q. So, there was no psychological tests conducted?
A. There was no psychological testing conducted.
Q. It's also correct to say there was no other medication or counseling with which he cooperated?
A. Sir, if a psychiatrist, based on evaluation and observation, comes to this conclusion that the

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A. Would you repeat that again, please. Certainly, Doctor. Often mentally ill individuals --
A. What are you referring to there?
Q. Just take the statement, Doctor. We'll get to where

it's from. Often mentally ill individuals find their problems so painful, they avoid exposing their symptoms without coaxing; they often evade or deny problems that malingerers willingly admit?

A. They might.

Q. So, if Mr. Macaro says to you, "There's nothing wrong with me," that is consistent with mental illness rather than with malingering, isn't that correct, Doctor?

A. That might be.

THE WITNESS: Sir, may I add something?

THE COURT: Yes.

THE WITNESS: I did not diagnose Mr. Macaro in my diagnosis as malingering. I put Axis One, no diagnosis. And Axis Two, personality disorder, not otherwise specified. I did not diagnose him as a malingerer.

Q. I just wanted to clarify it. I appreciate



your helping us out on that.

A. But he might be. I don't know.

Q. The reason you don't know is because you don't have the tests to determine that, is that correct?

A. I don't have that test.

Q. Doctor, would you agree with the statement that Mid-Hudson's two most recent fitness evaluations, which find him fit, base this finding on a new interpretation of his uncooperativeness with the hospital staff, rather than continuing to see this delusionary process as being a symptom of his paranoia and psychotic illness, and they are now seeing it as voluntary?

A. Sir, I have not seen any psychotic symptoms in Mr. Macaro. I have not observed that, I have not seen that.

Q. Now, is it also correct, sir, that in your record Mr. Macaro has repeatedly and consistently denied to the staff the presence of any hallucinations?

A. I do believe so. Q. I'm sorry?

A. He might. I don't know.
Q. You don-t recall,?

**Herman - Direct**

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THE COURT CLERK: Would you please be seated. Would you please state your full name and spell your last name.
THE WITNESS: Edward R. Herman, H-e-r-m-a-n, MD.
THE COURT CLERK: Thank you. -Your business address?
THE WITNESS: Westchester County Medical Center, Correctional Health Services, P.O. Box 1D, Valhalla, New York, 10595.
THE COURT CLERK: Thank you.
BY MR. AURNOU:
Q. Doctor, would you please kind enough to tell Judge Cowhey your educational background, degrees and admissions, please?
A. I attended medical school at New York Medical College graduating in 1982. I did my psychiatric residency training at the New York Medical College, Westchester Training Contortion from 1982 through 1986. Beginning in July of 1986 I began working at the Westchester County Medical Center, first running

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one of the adult in-patient psychiatric units, and then in 1989 I became Director of Correctional Health Services and Forensic Psychiatry. I then became board certified in psychiatry in 1987.
Q. would you please tell us, Doctor, did you have occasion in the course of your work to meet the Defendant in this case, Mr. Raymond Macaro?
A. Yes.
Q. Was that on more than one occasion?
A. Yes.
Q. On every such occasion, Doctor, was that pursuant to your selection as an expert for the purpose of examination as

a qualified psychiatrist by the commissioner of Mental Health?

A. Yes, it was.

Q. You know, of course, that each of those orders was signed by Judge Cowhey directing an examination?

A. Yes.

Q. Now --

MR. AURNOU: May we go off the record one second your Honor?

THE COURT: All right.

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objection.

THE COURT: Defendant's Exhibit c is admitted into evidence.

(Marked.)

Q. Doctor, in this report after noting his extensive psychiatric history and multiple hospitalizations, you make the statement that his mental status includes an increased psycho-motor activity?

A Yes.

Q Now, would you be kind enough to define that for Judge Cowhey?

A. Yes. That means his activity level was over and above what would be considered to be normal. He was very fidgety, very restless, he couldn't sit still in the chair.

Q. Okay. And then a little further on in your report you have, "Speech clear and coherent, though he is quite tangential. Speech is also quite pressured." Would you explain that to his Honor?

A. Yes. Tangential speech is basically what I described earlier where the question is asked, the person starts to answer, but then goes off in different

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directions and never is able to bring himself back to answer the question.

Q. On that occasion, Doctor, did that occur once or twice,

or did it pervade the entire examination?
A. Pretty much every question was answered in a tangential fashion.
Q. Now, what about the speech is also quite pressured?
A. Pressured means that the rate of speech and the flow of his speech was increased to the point that it was very difficult to interrupt him once he started talking. So, that if someone is speaking very rapidly, very quickly without really listening to what else is going on, so then it becomes almost impossible to interrupt.
Q. Was there any refusal on the part of Mr. Macaro to talk to or to cooperate with you in the examination or did he respond to all of your questions?
A. There were some questions that he didn't want to answer, but I don't recall specifically which ones those were.
Q You noted that the patient had grandiose and



alert and oriented, as well as the non-existent insight and judgment impaired, how they exist together?
A. Alert refers to a level of consciousness, someone who is awake and responsive. They're alert. Oriented means their ability to be aware of some of their surroundings with respect to the knowledge of time, so they're being aware of the date, that sort of thing, place and person.
In terms of insight, insight means someone's self awareness in terms of the problems they would be experiencing, and again in Mr. Macaro's case he had absolutely no recognition of having any problems or that he was demonstrating any psychiatric symptomatology.
In terms of judgment, judgment relates to how someone would react to a specific situation. There are what are considered appropriate reactions and inappropriate reactions, and Mr. Macaro's descriptions of his reactions were of an inappropriate type.
Q. Now, you diagnosed Mr. Macaro as schizophrenia, paranoid type?

A. Yes.
Q. Is that an accepted diagnosis?
A. Yes.

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persecutory delusions, but that no hallucinatory experiences were elicited. Would you please comment on that?
A. The grandiose and the persecutory delusions, grandiose means that someone has an overinflated sense of self to the point where their belief in themselves or in their overexaulted position has become fixed and is not based in reality. The persecutory delusions, what I referred to earlier in my testimony, the feeling that people were out to hurt him, and not based on reality. In terms of the hallucinatory experiences, he was not demonstrating any evidence of hearing voices or seeing things that weren't there.
Q. In response to your questioning, he didn't claim any?
A. No. When I asked him about voices, he denied hearing any.
Q. You found him alert and oriented, is that correct?
A. Yes.
Q. And you also found that his insight is
almost non-existent, that his judgment is impaired. Would you explain all of that, including the

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Q. Under DSM, now four?
A. Yes.
Q. Doctor, just if you could forgive me one digression, would you please tell the Court how many times you have previously testified as an expert in this area, approximately?
A. It's probably about thirty or forty times now.
Q. And that has been exclusively here in Westchester County?
A. For criminal matters, yes.
Q. And in civil cases?
A. In civil cases, I've testified as an expert in Westchester and in Suffolk County.

Q. Now, would you please return to the original area, and I apologize for digressing, and explain to his Honor exactly what schizophrenia, paranoid type, means?
A. Schizophrenia is a psychiatric illness that basically involves an impairment in a person's contact with reality. Paranoid type refers to a sub-group from schizophrenia where the predominant symptomatology involves the persecutory delusions or grandiose

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delusions. In order to make the -- somebody would need to have hallucinations or delusions or other types of loss of contact with reality. An impairment of !social functioning, it's difficult in relating to other people. That would be an overview.
Q. Is that considered a recognized major mental illness?
A. Yes, it is.
Q. Would you please tell me, Doctor, you concluded that he was unable or unfit to stand trial, and that he was unable to assist in his own defense because of his extensive delusional system and thought disorder. Would you explain that for his Honor?
A. Yes. Based on his inability to be able to answer questions in a responsive manner, his extensive paranoia which also included his attorney, Mr. Aurneu, that he was not able to assist because of how pervasive his symptoms were.
Q. Would you explain to his Honor in what way his paranoia included myself and other attorneys?
A. He had -- Mr. Macaro has a very strong

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distrust of attorneys in general based on what he described as experiences with having attorneys not do their job appropriately in other cases in the civil case Mr. Macaro was involved with. So, basically he felt that all attorneys were incompetent and would be unable to assist him.
Q Did you recommend that if there was to be any hope

of --
MR. BOLEN: Judge, I have to object to the leading here. He's got. the report in evidence. He's reading from it.
THE COURT: Would you ask him the question, please.
MR. AURNOU: Surely.
Q. You wrote in your report he would have to have anti-psychotic treatment, even though this may not be of certainty. Would you please explain, Doctor, one, why you felt medication would be an option, and, two, why it may not work?
A. The recommended type of treatment for schizophrenia is the use of anti-psychotic medications. These medications will work approximately seventy to eighty percent of the time. The more fixed

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the delusions are, the less response that there is to medication. So, that's why there wouldn't be any certainty of the possibility of improvement.
Q. Well, taking from where you were, Doctor, at the time that you examined Mr. Macaro for the first time in January of 1993, did you find his delusions to be very fixed?
A. He had very fixed delusions.
Q. ones which would be naturally resistant even to medication?
A. That's something I couldn't answer.
Q. Now,, did you have occasion to examine Mr. macaro again in March of 1994?
MR. AURNOU: I'm showing the witness Defendant's Exhibit E, your Honor. (witness examines.)
A. Yes, I did. Is the document that you have in your hand the report that you made and filed with the Court as a result of that examination?
A. Yes, it is.
MR. AURNOU: I offer Defendant's Exhibit E in evidence.
MR. BOLEN: on what basis? The witness is

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as they went off, were they bizarre or off the deep end?
A. Yes. All of them basically demonstrated the paranoid thinking that Mr. Macaro seemed to possess.
Q. And was the finding of that examination consistent with your first examination?
A. Yes.
MR. AURNOU: Your Honor, at this time I would like to offer --, I'm sorry, it is in evidence. I beg your pardon. That would leave us, your Honor, with the last two, which I think the Court has. I think I had handed them back up to you, the most recent ones.
THE COURT: Which ones are those?
MR. AURNOU: The August of 1994 reports.
THE COURT: Yes. Do you want them now?
MR. AURNOU: Yes, please.
Q. Now, Dr. Herman, as a result of yet another order under Section 730 did you have occasion to examine Mr. Macaro once again in August of 1994?
A. Yes, I did.
Q. Would you please tell us your recollection

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of that examination?
A. Yes. The examination was again held in the visiting area of the Westchester County Jail. Present were Dr. Lothringer, Mr. Aurnou, myself, as well as Mr. Macaro. Mr. Macaro came into the room. This time the one significant difference that I had noticed right away from the preceding evaluations was that he seemed to be much less intense in his presentation compared to the previous two evaluations. However, in terms of his responsiveness to questions, that remained consistent in that he was still quite tangential and going off in many directions. In fact, at times totally forgetting what the question was that he had been asked. He still continued to display the persecutory delusions, the grandiose delusions. This time, in addition to

involving the hospital in Illinois, he also was incorporating Mid-Hudson Psychiatric Center to his persecutory delusions. He still continued to have -- he continued to make statements about his inability to trust lawyers in general. When specifically asked about whether he was able to trust his defense attorney, he said no.

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Though, he was not able to give any specific reasons why not. So, the interview overall went very similarly to the preceding two examinations in terms of the content. Did he on that third interview exhibit what you called depression?

A. He appeared somewhat depressed. It was primarily manifested in a sort of lack of intensity as compared to the previous evaluations. His overall demeanor was much more subdued, the most recent evaluation, as compared to the one earlier in 1994 and the other one in 1993.

Q. What about his psycho-motor activity?

A. Again, that was while -- well, while there was some increase in general, it was much less as compared to the previous evaluations.

Q. What about the rate of his speech?

A. His speech was still pressured.

Q. What does pressured speech indicate to a psychiatrist, Doctor?

A. Pressured speech is a symptom that is most commonly associated with what's called a bi-polar disorder mania. Basically what it involves is that

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person's thought processes seem to go faster than almost their ability to speak., So, their speech has to go very quickly in order to keep up with their thoughts. Very often, because of that, someone who is demonstrating pressured speech as part of this is not really able to focus on the questions that they're asked, and again it becomes very difficult, if not impossible, to interrupt.

Q. Now, Doctor, when they get into this pressured

speech do they become him more or less or not at all aware of their surroundings and what's happening around them?

A. I don't think it affects their awareness of their surroundings or what's happening around them,. Where I think it interferes is in their ability to concentrate on what they were talking about.

Q. Well, I'd like you to Put it in the court setting for a moment, Doctor. Hypothetically, if the Defendant were sitting here at a trial in his own case, and if he heard something that upset him and got him started on pressured speech, what would be his ability to concentrate on what was happening after that as the questions and answers continued?